EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 040

CASE NBR 85-1-00969 CFX
SHORT TITLE Gray, Lawrence E., et al.
VERSUS OPM

DOCKETED: Dec 6 19

Date	Proceedings and Orders
Dec 6 1985	Petition for writ of certiorari filed.
Jan 3 1986	Brief amicus curiae of Federal Administrative Law Judges Conference filed.
Jan 3 1986	Order extending time to file response to petition un February 5, 1986.
Jan 6 1986	Supplemental brief of petitioners Lawrence Gray, et al. filed.
Feb 5 1986	Brief amicus curiae of Natl. Treasury Employees Union fi
Feb 11 1986	Brief of respondent OPM in opposition filed.
Feb 12 1986	DISTRIBUTED. February 28, 1986
Mar 3 1986	REDISTRIBUTED. March 7, 1986
Mar 12 1986	REDISTRIBUTED. March 21, 1986
Mar 24 1986	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)
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85-969

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE E. GRAY, EDWARD J. MURTY, JR.
and PETER McC. GIESEY,
Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,
an Agency of the U.S. Government,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to resolve a serious conflict among the circuits regarding whether the Civil Service Reform Act of 1978 bars suits by federal employees, and particularly by administrative law judges, under Section 701 *et seq.* of the Administrative Procedure Act alleging arbitrary and capricious agency personnel action.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Lawrence E. Gray, Edward J. Murty, Jr. and Peter McC. Giesey petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 771 F.2d 1504 (D.C. Cir. 1985) and contained in the Appendix ("App.") at 1a to 22a. The opinion of the District Court for the District of Columbia is not reported, but is found at App. 23a to 33a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was filed on August 9, 1985. (App. at 34a to 35a.) The order of the Court of Appeals for the District of Columbia Circuit denying a rehearing *en banc* was filed on October 7, 1985. (App. at 36a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978 ("CSRA"), as amended and codified throughout 5 U.S.C.; the Administrative Procedure Act ("APA"), as amended, 5 U.S.C. § 701 *et seq.*; and 5 C.F.R. §§ 930.204 and 930.210(b) are found at App. 37a to 46a.

STATEMENT OF THE CASE

This case arises out of the Office of Personnel Management's ("OPM") arbitrary and capricious failure in August 1981 to direct the promotion of petitioners, three Department of Labor Administrative Law Judges ("ALJs"), from GS-15 to GS-16 in violation of applicable statutes, regulations and administrative policy, while at the same time directing the promotion to GS-16 of 39 other ALJs who performed the same work as petitioners.

In April, 1981, petitioners Lawrence E. Gray, Edward J. Murty, Jr., and Peter McC. Giesey operated under a Department of Labor "dual" position description for ALJs. Pursuant to this classification, they were authorized to hear and decide cases classified at both the GS-15 and GS-16 levels, but were compensated at the GS-15 level. That same month, OPM reclassified two of the kinds of cases presided over by "dual" position ALJs from the GS-15 to the GS-16 level of complexity. As a result, seventy percent of petitioners' work was classified at the GS-16 level.

At that time, the only OPM regulation governing ALJ promotions, 5 C.F.R. § 930.204,[1] required that incumbents be promoted when their positions were reclassified upwards. Instead of promoting all of the "dual" position ALJs, including petitioners, to GS-16, OPM decided that it would only promote some of them in accordance with a new regulation that had not yet been promulgated, 5 C.F.R. § 930.204(b). Twelve ALJs, including petitioners, were not promoted, even though they were presiding over the same "mix" of cases as the 39 ALJs who were promoted.

For the next 18 months, petitioners repeatedly asked OPM for a reconsideration of the decision not to direct their promotion, or at least to provide a reasoned explanation for OPM's failure to follow the clear mandate of Section 930.204(a). OPM would not respond substantively to petitioners' requests. Their patience exhausted, petitioners filed suit in February 1983, alleging that OPM had violated, *inter alia*, the "Classification Act," 5 U.S.C. § 5101 *et seq.* (1982), the Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A), and 706(2)(D) (1982), 5 C.F.R. § 930.204(a) (1984), and their right to due process under the Fifth Amendment.[2]

For almost a year, petitioners' case was pending before District Court Judge Joyce Hens Green, and dispositive cross-motions for summary judgment had been submitted. However, without addressing the merits, the district court dismissed petitioners' case on December 21, 1983, for lack of subject matter jurisdiction. In so doing, the court retroactively applied the District of Columbia Circuit's August 1983 decision in *Carducci v. Regan*, 714

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[1] This regulation, which has its statutory basis in the "equal pay for equal work" provision of 5 U.S.C. § 5101, was later recodified as § 930.204(a).

[2] Petitioners are not seeking review of the Court of Appeals' finding that their constitutional claims were moot. (App. at 19a).

F.2d 171 (D.C. Cir. 1983). *Carducci* barred district court review of federal employees' non-constitutional personnel grievance claims in favor of administrative appeal to the Office of Special Counsel at the Merit Systems Protection Board. *Id.* at 174-75. The district court held that "[t]he scope of the *Carducci* ruling precludes review by this Court of those matters which plaintiffs should have addressed to the Office of Special Counsel." (App. at 28a.)

On August 9, 1985, the Court of Appeals for the District of Columbia Circuit affirmed the dismissal below. Following *Carducci*, the court rejected petitioners' argument that the CSRA did not take away an ALJ's *pre-existing* right under the APA to challenge arbitrary and capricious personnel practices in federal court. The Court of Appeals stated that it could find "no special provision" in the CSRA mandating that ALJs be treated differently from other federal employees. (App. at 14a.) At the same time, the Court of Appeals acknowledged that its analysis and result were *directly contrary* to the First Circuit's 1984 decision in *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984):

> In *Dugan*, the First Circuit held that despite passage of the CSRA, APA review remained available to an applicant for an ALJ position, a conclusion clearly contrary to *Carducci*. Appellants would have us follow *Dugan*. This, of course, we cannot do. *Carducci* is binding precedent which can be overruled only by the court *en banc*.

(App. at 12a to 13a.)

Following entry of the Court of Appeals' opinion and judgment, petitioners sought rehearing *en banc*. The Court of Appeals denied rehearing in an order filed on October 7, 1985. (App. at 36a.)

REASONS FOR GRANTING THE WRIT

I. There Is a Serious Conflict Among the Circuits Concerning the Preclusive Effect of the Civil Service Reform Act on Judicial Remedies Available to Federal Employees

This case is of exceptional importance because it presents the Court with an opportunity to overrule a recent spate of Court of Appeals' decisions denying the APA-conferred right of government employees—including administrative law judges—to challenge arbitrary and capricious personnel actions in federal court.

During the past four years, nine circuits have held that the Civil Service Reform Act of 1978 established the Office of Special Counsel at the Merit Systems Protection Board as the exclusive forum for the resolution of federal employment disputes involving "lesser personnel actions not involving constitutional claims." *See Carducci v. Regan*, 714 F.2d at 174. *Accord Pinar v. Dole*, 747 F.2d 899, 913 (4th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985) ("Congress clearly intended the CSRA to be the exclusive remedy for federal employees"); *Broadway v. Block*, 694 F.2d 979, 986 (5th Cir. 1982) (employee may not "circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA"); *Braun v. United States*, 707 F.2d 922, 925-27 (6th Cir. 1983) (CSRA "appears to have been intended to provide comprehensive protection to whistleblowers . . . which would preclude independent lawsuits by individual claimants"); *Schrachta v. Curtis*, 752 F.2d 1259, 1260 (7th Cir. 1985) ("Congress intended the remedies provided by the CSRA to be the exclusive means to remedy violations of the Act's substantive provisions"); *Carter v. Kurzejeski*, 706 F.2d 835, 840 (8th Cir. 1983) ("the comprehensive statutory framework created in the 1978 legislation was intended as an exclusive means of redress"); *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir.

1984) (CSRA "indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all"); *Weatherford v. Dole*, 763 F.2d 392, 394 (10th Cir. 1985) (adopting "both the reasoning and result of *Broadway*"); *Hallock v. Moses*, 731 F.2d 754, 757-58 (11th Cir. 1984) (plaintiff must "follow the remedial system constructed by Congress to give federal employees . . . appropriate relief").

In so holding, these cases either expressly or implicitly bar government employees from seeking judicial review of arbitrary and capricious personnel practices under Section 701 *et seq.* of the APA. Indeed, the above-cited cases have either held or implied that the CSRA precludes resort to this pre-existing right to judicial review under the APA, despite the fact that neither the CSRA's text nor its legislative history discloses any express intent of Congress to preclude such review.

These decisions are in direct conflict with well-established Supreme Court doctrine holding that elimination of a pre-existing right of judicial review requires "clear and convincing" evidence of Congressional intent—evidence which is not present in the CSRA. *See, e.g., Johnson v. Robison*, 415 U.S. 361, 373-74 (1974); *Barlow v. Collins*, 397 U.S. 159, 167 (1970); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967). Indeed, to date only one circuit which has faced the task of determining the proper relationship between the CSRA and the APA has remained faithful to the principles embodied in *Abbott Laboratories*, *Barlow*, and *Johnson*. *See Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984).

In *Dugan*, the First Circuit held that an ALJ applicant was *not barred* by the Civil Service Reform Act from filing suit in federal district court to challenge the arbitrary denial of his application. *Id.* at 194. Addressing the proper relationship between the APA and the CSRA, the First Circuit held that the CSRA did not preclude judicial review under the APA of OPM's decision not to process Dugan's ALJ application. *Id.* at 194-95.

The First Circuit expressly rejected the view that the CSRA prohibited judicial "review of final personnel decisions that do not find their way to the [Merit Systems Protection Board]." *Id.* at 194. Such a conclusion, said the court,

> [R]uns counter to the strong presumption in the law that favors reviewability and almost never implies statutory preclusion of review from congressional silence.

Id. at 195. Moreover, the court said that the CSRA's failure to provide expressly for MSPB review of the personnel action at issue (*i.e.*, arbitrary denial of Dugan's application) did not commit that action solely to agency discretion:

> [T]he fact that an agency enjoys broad discretionary powers does not mean judicial review is forbidden . . . . [H]ere . . . there is no reason to believe that Congress wished or needed to preclude review of unlawful action in order to carry out a statutory objective.

Id. See also Gilley v. United States, 649 F.2d 449, 453 (6th Cir. 1981) (affirming district court jurisdiction over government employee's claim for relief on grounds that Office of Special Counsel and district court are "not mutually exclusive" avenues of relief).

Petitioners respectfully urge the Court to embrace the reasoning of *Dugan* and renew its commitment to the time-honored principle that the *elimination* of a pre-existing right of judicial review (unlike the mere *creation* of a new cause of action) requires "clear and convincing" evidence of congressional intent.[3] *Johnson v.*

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[3] While the *Carducci* court believed that the "clear and convincing" test applied only in the context of remedies for constitutional

Robison, 415 U.S. at 373-74; *Barlow v. Collins*, 397 U.S. at 167; *Abbott Laboratories v. Gardner*, 387 U.S. at 140-41; *Dugan v. Ramsay*, 727 F.2d at 195. As this Court stated in *Barlow*:

> [J]udicial review of . . . administrative action is the rule, and nonreviewability an exception which must be demonstrated.

397 U.S. at 166. Indeed, the "right of judicial review is ordinarily inferred" where—as with the CSRA—Congress intended to protect the class of persons (*i.e.*, government employees) to which petitioners belong. *Id.* at 167.

Of course, petitioners recognize that

> [w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Block v. Community Nutrition Institute, —— U.S. ——, 104 S. Ct. 2450, 2454 (1984). However, petitioners note that in that same opinion, this Court again affirmed the existence of a "presumption favoring judicial review" which must be deemed controlling where there exists "substantial doubt about the congressional intent" to preclude such review. *Id.* at 2456-57.[4]

Here, there simply is *no* evidence in the CSRA or its accompanying legislative history—let alone "clear and

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violations *Carducci v. Regan*, 714 F.2d at 173-74, this is not so. *See Barlow v. Collins*, 397 U.S. at 167; *Abbott Laboratories v. Gardner*, 387 U.S. 140-41; *Dugan v. Ramsay*, 727 F.2d at 194-95; *Gilley v. United States*, 649 F.2d at 453.

[4] In *Block*, at least one class of persons (*i.e.*, milk handlers) was left with a right to seek review of unlawful agency action in federal court. 104 S. Ct. at 2458. In holding that petitioners may not challenge OPM's unlawful actions in district court, the Court of Appeals has effectively said that *no one* may bring such a suit.

convincing evidence"—that Congress intended to deny government employees access to the only forum truly capable of effectively protecting their employment rights, including the right to equal pay for equal work which is a touchstone of the merit system. Although the lower courts have directed petitioners to the Office of Special Counsel for redress of their grievances, this remedy is plainly inadequate. The nature of the Special Counsel's inquiry into a complaint is *discretionary*, and there is *no appeal* from or judicial review of its decision whether to act. *See Borrell v. International Communications Agency*, 682 F.2d 981, 984-85 (D.C. Cir. 1982). Indeed, the Special Counsel is a political appointee who may be removed from office by the President. 5 U.S.C. § 1204 (1982). There is simply no comparison between the right to judicial review guaranteed by the APA and the sort of discretionary review available at the Office of Special Counsel. As the First Circuit pointedly observed in *Dugan*:

> "[I]t strikes us as implausible to believe that Congress wished to withdraw court review of even egregious agency behavior in the area—even if, for example, an agency were to discard applications as a result of bribery or the roll of the dice. We therefore reject it.

Dugan v. Ramsay, 727 F.2d at 195.

Given the lack of evidence that Congress intended the CSRA to preclude judicial review under the APA, the correct approach is to treat the APA and CSRA as complementary, and not mutually exclusive, vehicles for the protection of employee rights. This is especially necessary given the nature of the Special Counsel's role. Therefore, petitioners respectfully urge the Court to adopt *Dugan* and reverse those cases which hold that the CSRA precludes resort to federal court by government employees victimized by arbitrary and capricious personnel practices.

II. The CSRA Does Not Bar Suits by Administrative Law Judges Under Section 701 *et seq.* of the Administrative Procedure Act Alleging Arbitrary and Capricious Agency Personnel Action

This case is also of exceptional importance because the Court of Appeals' decision seriously undercuts the independence and integrity of the federal ALJ corps by stripping administrative law judges of the protections afforded by judicial review under Section 701. Moreover, it allows to remain unchallenged the flagrant failure of the Office of Personnel Management ("OPM") to comply with its obligations under the Classification Act and its own reclassification regulations in determining ALJ promotions, a failure which has broad ranging effects on the entire ALJ corps.

While it strains credulity to believe that—without uttering a single syllable to that effect—Congress intended to withdraw from all federal employees their pre-existing right to judicial review under the APA, it is unthinkable that Congress intended to withdraw that right from administrative law judges, a category of federal employees whose independence from agency meddling Congress has consistently attempted to protect. The Court of Appeals clearly erred in applying *Carducci* to suits by ALJs under the APA challenging arbitrary and capricious personnel actions directed at them.

The First Circuit's recent *Dugan* opinion, and decisions in the District of Columbia Circuit predating *Carducci* and *Gray* which have never been expressly overruled, recognize that ALJs (and ALJ applicants) do have a right—despite passage of the CSRA—to seek judicial review of arbitrary and capricious agency personnel action under the APA. *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984). *Accord Etelson v. Office of Personnel Management*, 684 F.2d 918 (D.C. Cir. 1982);[5] *Friedman*

[5] Although the Court of Appeals suggested that the *Etelson* court did not find plaintiff's action precluded by the CSRA because his "claim was pending prior to the effective date of that Act" (App. at 11a), Etelson did not file his suit until *three months after* the CSRA had become effective. *Etelson v. Office of Personnel Management*, 684 F.2d at 922; Pub. L. 95-454, Section 907.

v. Devine, 565 F. Supp. 200 (D.D.C. 1982), *aff'd mem.*, 711 F.2d 420 (D.C. Cir. 1983). Regardless of the merits of applying *Carducci* to other categories of federal employees, the independence and integrity of the federal ALJ corps is far too important to the proper functioning of government to allow ALJs to be stripped of the protections afforded them by the right to judicial review under the APA.

ALJs *are* different from other federal employees and require a higher degree of judicial protection from improper personnel practices. Congress, in enacting statutes governing the treatment of ALJs, has consistently and explicitly provided for the protection of ALJs from agency pressures threatening the exercise of their independent judgment.

When it first created the APA's comprehensive scheme providing for agency use of ALJs, Congress was determined "to render [ALJs] independent and secure in their tenure and compensation." S. Rep. No. 572, 79th Cong., 1st Sess. 215 (1945). Further, pursuant to 5 U.S.C. § 4301(2)(D) (1982), Congress excluded ALJs from the definition of "employee[s]." The statute thereby prohibits agencies from rating or appraising ALJ performance. In addition, 5 U.S.C. § 554(d) (1982) provides that ALJs are not responsible to or subject to the direction or supervision of investigative or prosecutorial personnel in the agency. Under 5 U.S.C. § 3105 (1982), ALJs may not perform duties inconsistent with their functions as ALJs, and cases are to be assigned to ALJs in rotation so far as is practicable. ALJs are also entitled to pay determined independent of agency recommendations or ratings. 5 U.S.C. § 5372 (1982). As to within-grade pay increases, the requirement for other

federal personnel that their "work be of an acceptable level of competence as determined by the head of his agency" does not apply to ALJs. 5 C.F.R. § 930.210(b) (1984).

At the heart of the APA's goal of assuring ALJ independence is 5 U.S.C. § 7521 (1982). Here, Congress established wholly different standards for agency support of actions taken against ALJs from those applicable to non-ALJ employees. Under Section 7521, an agency seeking to take an adverse action against an ALJ can only do so upon a showing of "good cause" in support of such action. In contrast, agencies may take adverse action involving non-ALJ employees "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513 (1982).

By continuing to use language wholly different from that governing the imposition of disciplinary measures on most federal personnel, Congress plainly demonstrated its intent to preserve the carefully created distinctions between ALJs and other federal employees. Indeed, this Court has recognized that

> There can be little doubt that the role of the modern . . . administrative law judge . . . is "functionally comparable" to that of a judge. . . . [T]he process of agency adjudication is currently structured so as to assure that the [ALJ] exercises his independent judgment . . . free from pressures by the parties or other officials within the agency.

Butz v. Economou, 438 U.S. 478, 513 (1978). Moreover, the independent status of ALJs was not changed by passage of the CSRA. *Nash v. Califano*, 613 F.2d 10, 13 n.7 (2d Cir. 1980) (although the CSRA "worked a substantial revision of the Civil Service system, it did not alter the statutory status of ALJs.")

Clearly, at least with respect to ALJs, there is—in the words of the *Block* court—a "substantial doubt" that

Congress intended the CSRA to eliminate ALJs' existing right to bring suit under the APA. Balanced against the above-listed *multiple and unequivocal* expressions of congressional intent to protect ALJs from improper agency action, the lower courts have posited nothing more than the existence of a "scheme" of administrative remedies for federal employees generally and congressional silence as to whether those protections supersede an ALJ's preexisting right to seek relief in federal court. The evidence of preclusion is doubtful at best, and cannot, by any stretch of the imagination, be called "clear and convincing." Therefore, with respect to ALJs, the presumption in favor of judicial review should be deemed controlling.

Indeed, if ALJs are denied judicial review under the APA of arbitrary and capricious agency personnel actions directed at them, there is a serious risk that their independence from political pressures will be undermined in contravention of Congress' carefully crafted scheme to promote independent decision-making by ALJs. It does not tax credulity to imagine that a given agency or administration might attempt to "discipline" a "wrong-thinking" ALJ by engaging in a "prohibited personnel practice" for which *Carducci* holds that there is no right to MSPB or judicial review. Such practices might include failing to promote the ALJ or discriminating with respect to case assignments, which discrimination would lay the foundation for a downgrading that would be unappealable under *Carducci*. If such abuses were allowed to go unreviewed in district court, the much vaunted independence of ALJs would soon be but an empty abstraction.

Finally, the identification by the *Carducci* court of a discrete group of "lesser" personnel actions for which judicial review was precluded by the CSRA, does not include the failure of OPM to comply with the Classification Act and its own regulations by failing to direct petition-

ers' promotions.[6] An agency decision having such broad-ranging effects on the entire ALJ corps at a number of agencies is hardly "minor" in its impact. Further, it is readily distinguishable from the isolated, fact-oriented disputes involved in the circuit court decisions cited above. Therefore, the District Court and the Court of Appeals erred in holding that the CSRA barred petitioner ALJs' claims under the APA.

CONCLUSION

For the above reasons, petitioners respectfully request that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit entered in this case.

Respectfully submitted,

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Dated: December 6, 1985

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[6] Under the circumstances present in this case, Section 701(a) "creates a strong presumption of reviewability that can be rebutted only by a clear showing that judicial review would be inappropriate." *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979). Moreover, even where there is a comprehensive statutory review scheme, there are circumstances in which federal question subject matter jurisdiction may exist in the United States District Court. *Nader v. Volpe*, 466 F.2d 261 (D.C. Cir. 1972).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5052

LAWRENCE E. GRAY, *et al.*,
Appellants

AUGUSTUS A. SIMPSON, JR.

v.

OFFICE OF PERSONNEL MANAGEMENT,
an Agency of the U.S. Government, *et al.*

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 83-00354)

Argued January 30, 1985

Decided August 9, 1985

James H. Curtin, with whom *Francis A. O'Brien* was on the brief, for appellants. *Stephen M. Ryan* entered an appearance for appellants.

Michael J. Ryan, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Royce C. Lamberth*, *R. Craig Lawrence*, *William H. Briggs, Jr.*, Assistant United States Attorneys and *James S. Green*, Attorney, Office of Personnel Management were on the brief, for appellees.

Before: ROBINSON, *Chief Judge*, STARR, *Circuit Judge*, and BRYANT,* *Senior District Judge*.

Opinion for the Court filed by *Circuit Judge* STARR.

STARR, *Circuit Judge*: In this appeal, we are called upon to determine whether the District Court properly dismissed two consolidated actions brought by four Department of Labor Administrative Law Judges. The appellants were among a group of ALJs who remained at their GS-15 pay level despite an Office of Personnel Management directive promoting thirty-nine of their colleagues to GS-16. Eighteen months after petitioning OPM to direct their promotion and not having received a definitive response, appellants filed suit in federal district court challenging OPM's failure to promote them as violative of, *inter alia*, the Classification Act, 5 U.S.C. §§ 5101 *et seq.* (1982), the Back Pay Act, *id.* §§ 5596 *et seq.* (1982) and their Fifth Amendment right to due process. The District Court dismissed appellants' statutory claims for lack of subject matter jurisdiction, citing this Court's decision in *Carducci v. Regan*, 715 F.2d 171 (D.C. Cir. 1983), and rejected on the merits appellants' constitutional claims.

I

The relevant facts are not in dispute. The appellants, Melvin Warshaw, Lawrence Gray, Edward Murty, Jr. and Peter Giesey, are presently GS-16 Administrative Law Judges employed by the Department of Labor. However, in August 1981, when OPM directed the promotion of thirty-nine GS-15 ALJs at the Department of Labor to GS-16, appellants were not among those promoted.

A

The August 1981 promotions represented the culmination of an effort by OPM to restructure the Department

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 294(d).

of Labor's ALJ corps. Prior to April 1981, ALJs at the Department fell into one of three position descriptions: performance of (1) exclusively GS-16 level casework, or (2) exclusively GS-15 level casework, or (3) a combination of the two types of casework. The third category of ALJs, referred to by the parties as "dual position" ALJs, were compensated at the GS-15 level.

Pursuant to its authority to review agency implementation of classification standards under the Classification Act, OPM reviewed the classification of ALJ job descriptions at the Department. As a result, in April 1981 OPM reclassified from GS-15 to GS-16 two of the types of cases presided over by "dual position" ALJs, namely cases under the Longshoremen's and Harbor Workmen's Compensation Act ("Longshoremen's") and cases under the Comprehensive Employment and Training Act ("CETA"). This reclassification tipped the balance of GS-15 and GS-16 level cases handled by "dual position" ALJs in favor of a GS-16 classification for such judges. OPM, accordingly, examined the overall workload performed by the Department's ALJ corps and determined that, as a result of the reclassification of CETA and Longshoremen's cases, thirty-six new GS-16 ALJ positions should be created. Consulting the GS-16 "Register," [1] OPM determined that thirty-nine of the fifty-one "dual position" ALJs were qualified to fill the new positions and, in consequence, directed their promotions pursuant to 5 C.F.R. § 930.204(b) (1985).[2] Appellants were

[1] An ALJ listed on the GS-16 Register has already been determined to be qualified for promotion to the GS-16 pay level as soon as a position becomes available.

[2] In June 1981, 5 C.F.R. § 930.204 was amended. The existing regulation was renumbered § 930.204(a) and a new § 930.204(b) was added. The text of the new regulation, published in the Federal Register on June 16, 1981 and subsequently in the Code of Federal Regulations on July 16, 1981, reads as follows:

> (a) When the Office of Personnel Management classifies an occupied administrative law judge position at a higher grade,

not listed on the Register, however, and were therefore not among the thirty-nine ALJs promoted in August 1981.

B

Appellants filed an appeal with OPM late in 1981. They asserted that notwithstanding the reclassification of job descriptions and the promotion of thirty-nine "dual position" ALJs, the actual work assignment practices at the Department had remained as before. The unhappy result of the confluence of promotions and unaltered work assignments was that both the thirty-nine recently-promoted ALJs and those left to languish at the GS-15 level were still functioning as "dual position" ALJs. Consequently, appellants argued, the merit system principle of equal pay for equal work was being violated in contravention of both the Classification Act and the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 111 (codified as amended in scattered sections of 5 U.S.C. (1982)). In addition, appellants argued that pursuant to 5 C.F.R. § 930.204(b) (1985), *supra* note 2, all "dual position" ALJs should have been

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the Office of Personnel Management shall direct the promotion of the incumbent administrative law judge and the promotion is effective on the date named by the Office of Personnel Management. This regulation pertains only to appointments to positions which because of their substantive and technical nature warrant a grade GS-16; the regulation does not pertain to positions which because of their managerial and administrative nature warrant a grade GS-16.

(b) No more than twice during a calendar year, an agency may notify the Office of Personnel Management that it wishes to fill a specific number of its grade GS-16 ALJ vacancies from among its grade GS-15 ALJs who are on the GS-16 ALJ register and who have served as judges at the agency for at least one year. The Office of Personnel Management shall select from the grade GS-15 ALJs of that agency those ALJs who it determines are best qualified for appointment to a grade GS-16 ALJ position and shall direct their appointment by the agency to such grade GS-16 ALJ positions.

promoted to GS-16 as soon as the Longshoremen's and CETA cases were reclassified, inasmuch as these ALJs were, at that time, performing principally GS-16 work.

OPM investigated appellants' complaint and concluded that the Department of Labor had, in fact, failed properly to implement OPM's reclassification plan. As OPM had envisioned the plan's operation, a bright line was to be drawn between GS-16 and GS-15 ALJs; that is, in OPM's contemplation, only GS-16 ALJs (who comprise 70% of the total ALJ corps at the Department of Labor) would perform GS-16 work and those ALJs would perform only GS-16 work. In contravention of this clear demarcation of GS level and level of responsibility, the Department was assigning GS-16 work to both GS-16 and GS-15 ALJs, all of whom would then devote approximately 70% of their time to performing GS-16 work.

C

In response to DOL's apparent management disarray, OPM froze GS-16 promotions for otherwise qualified GS-15 ALJs; moreover, OPM refused to act on individual appeals until the unhappy situation of blended responsibility could be resolved. Meanwhile, however, appellants repeatedly filed with OPM individual requests for promotion to GS-16. Frustrated in their attempt to speed up resolution of their respective appeals, appellants took leave of the administrative battlefield and repaired to federal district court.

In March 1983, shortly after the District Court actions were instituted, OPM's Director informed appellants that his agency could not authorize, at that time, additional GS-16 promotions because the 1981 reclassification and promotion scheme remained improperly implemented; it was therefore not possible at that stage, the OPM Director maintained, to determine whether additional GS-16 positions would be available once the plan finally began

to operate as intended. The Director further represented that once the management task at hand was completed, appellants' appeals would again be reviewed.

D

Despite these assurances, appellants continued to pursue their cases in district court. In his complaint, appellant Warshaw sought to compel OPM to direct his promotion outright. Jurisdiction was founded on the Mandamus Act, 28 U.S.C. § 1361 (1982). The gravamen of Mr. Warshaw's complaint was that, inasmuch as he had "fulfilled the promotional requirements contained in 5 C.F.R. § 930.204(b)," he should be considered "among the eligible GS-15 ALJs that DOL . . . had previously requested OPM to select for appointment to vacant GS-16 ALJ positions." J.A. at 15 (Complaint filed in *Warshaw*, C.A. No. 83-0248).

In *Gray*, three appellants filed a separate complaint seeking damanges and injunctive relief in addition to mandamus. Jurisdiction was based, *inter alia*, on the Administrative Procedure Act, 5 U.S.C. §§ 706 *et seq.* (1982), the Back Pay Act, 5 U.S.C. § 5996, the Mandamus Act, *supra*, and the Fifth Amendment. The gravamen of the *Gray* appellants' complaint was that, had OPM applied 5 C.F.R. § 930.204(a) (1982), instead of the newly promulgated § 930.204(b), OPM would have been required to promote all fifty-one "dual position" ALJs. *See supra* note 2. As a result, appellants asserted, they were being denied equal pay for equal work in contravention of both the Classification Act and the CSRA. In their prayer for relief, appellants sought, among other things, an order compelling OPM to direct their promotion, back pay, punitive damages and attorneys' fees (based on a claim of OPM's bad faith in refusing to respond to their request for promotion). J.A. at 32-34 (Complaint filed in *Gray*, C.A. No. 83-0354).

1

The *Warshaw* and *Gray* cases were consolidated and a single order, entered on December 21, 1983, dismissed the cases for lack of subject matter jurisdiction, based upon this court's supervening decision in *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983).[3] With respect to appellants' non-constitutional claims, the District Court held that, in light of this court's holding in *Carducci* (*i.e.*, that " 'the exhaustive remedial scheme of the CSRA would be impermissibly frustrated by permitting far lesser personnel actions not involving constitutional claims[] an access to the courts more immediate and direct than the statute provides with regard to major adverse actions,' " J.A. at 4-5 (quoting *Carducci*, *supra*, 714 F.2d at 174)), appellants were required to process their claims through the Office of Special Counsel ("OSC") and, if appropriate, the Merit Systems Protection Board ("MSPB"), before repairing to federal court.[4] Specifically, the District Court concluded that appellants'

[3] In *Carducci*, a United States Customs Service employee, who had been involuntarily reassigned on the basis of poor performance, appealed from a district court order dismissing his request for judicial review. This court affirmed the district court's holding that the employee had failed to state a claim upon which relief could be granted under the APA. The principal rationale was that, under the CSRA, none of Mr. Carducci's claims satisfied the definition of an "adverse action"; with respect to the remainder of his claims, either the "prohibited personnel practice" complaints had not been properly exhausted before the Office of Special Counsel or, in some cases, the personnel action taken against him was one "committed to agency discretion by law" and was therefore unreviewable. 714 F.2d at 174 (quoting 5 U.S.C. § 701(a)(2) (1976)).

[4] We observe at this juncture that appeals from decisions of the MSPB must be filed in the United States Court of Appeals for the Federal Circuit pursuant to the Federal Courts Improvement Act, 5 U.S.C. § 7703(b)(1) (1982). In addition, the question where any mandamus action would lie is implicated by this Court's decision in *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

claims did not rise to the level of "adverse actions" within the meaning of 5 U.S.C. § 7521 (1982);[5] however, the District Judge observed that their allegations could constitute grounds for a claim of "prohibited personnel practices" under *id.* 2302(a)(2)(A)(x) ("significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level"). The theory supporting this determination, in the District Court's view, was that the classification "laws and regulations [which were] allegedly violated implement the merit system principles which protect against arbitrary action, and insure fair and equitable treatment including equal pay for equal work." J.A. at 241-42 (citing 5 U.S.C. § 2301(b) (1982)).

Accordingly, the District Court concluded that, under *Carducci*'s teaching, appellants were required to exhaust the Office of Special Counsel-MSPB avenue of appeal. The District Court observed in this respect that, because appellants could now repair to the OSC, retroactively applying *Carducci* to their respective situations would not leave appellants without an adequate remedy. In addition, no basis could be found, the District Court stated, for distinguishing appellants from their counterpart in *Carducci.*

2

Moving to another branch of appellants' attack, the District Court held that the Back Pay Act did not confer

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[5] The term "adverse actions" as used in the CSRA context is defined as

"(1) a removal;
(2) a suspension;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less."

See 5 U.S.C. § 7521 (1982). Personnel actions which rise to level of "adverse actions" are directly appealable to the MSPB. *See id.* §§ 7501-7701 (1982).

federal court jurisdiction under these circumstances, inasmuch as appellants "are entitled to back pay only if they succeed on the merits of their claims." J.A. at 10 n.6. Success on the merits could be had, of course, only after recourse to the Congressionally provided avenue of potential relief. With respect to the contention that OPM's delay and general mishandling of appellants' claims violated their Fifth Amendment right to due process, the District Court concluded that, even assuming the existence of a cognizable "property" interest, appellants might have more promptly obtained OPM's decision regarding their appeals had they utilized the proper procedures and repaired to the OSC. Finally, the District Court dismissed a *Bivens* claim[6] on the authority of the Supreme Court's decision in *Bush v. Lucas*, 462 U.S. 367 (1983). Under that holding, Congress' crafting of such a comprehensive remedial scheme in the sensitive area of federal civil service personnel relations precluded the judicial creation of a cause of action directly under the Constitution. The District Court concluded that *Bush v. Lucas* fully applied here in light of the fact that the CRSA provides a comprehensive scheme of review "which prohibits arbitrary action and provides procedures by which improper action may be redressed." Order at 11, J.A. at 246.

II

On appeal, appellants argue that the District Court erred on several grounds in dismissing their claims for lack of subject matter jurisdiction. First, appellants contend that *Carducci* does not apply at all to suits brought by ALJs pursuant to the Administrative Procedure Act; in their view, the institutional need of ALJs for decisional independence mandates a greater degree of protection than that afforded by the CSRA. ALJs are, ap-

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[6] *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding, of course, that a cause of action can be implied from the Constitution itself).

pellants contend, sufficiently distinct from all other civil service employees that the CSRA's elaborate provisions, as elucidated by *Carducci*, should not preclude a direct federal court action under the APA. As a fallback position, appellants urge this court to reconsider *Carducci*, arguing that the decision is inconsistent with prior decisions of this court as well as a recent First Circuit decision. If *Carducci* must live, appellants argue next, it should nevertheless not be applied retroactively to bar their claims, which arose pre-*Carducci* and were brought into federal district court before that decision was handed down. Furthermore, in appellants' view, statutory grounds exist independent of the CSRA for retaining jurisdiction and that, in consequence, the District Court improperly dismissed their claims. Finally, appellants attack the District Court's determination that their due process claim lacked merit.

A

Two grounds, in appellants' view, support their contention that ALJs should be treated differently from other civil service employees for purposes of obtaining judicial review. First, appellants maintain that under this court's decisions in *Friedman v. Devine*, 711 F.2d 420 (D.C. Cir. 1983) and *Etelson v. OPM*, 684 F.2d 918 (D.C. Cir. 1982), as well as the First Circuit's decision in *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984), review under the Administrative Procedure Act remains available to ALJs despite the passage of the CSRA. In addition, appellants rely upon the myriad of statutory provisions, some of which are found in the CSRA, which single out ALJs for special treatment in one form or another.

1

In *Friedman*, an applicant for an ALJ position challenged OPM's failure to credit toward his seven-year, litigation-experience requirement time spent in an agency's

"Advice Division." Granting OPM's motion for summary judgment, the District Court based its jurisdiction on the APA with no discussion whatever of the CSRA. 565 F. Supp. 200 (D.D.S. 1982) *aff'd mem.*, 711 F.2d 420 (D.C. Cir. 1982).[7] Likewise in *Etelson*, *supra*, plaintiff challenged OPM's method of evaluating candidates for ALJ positions. In our opinion in *Etelson*, this court held that OPM's method of evaluating the litigation experience of government attorneys on the basis of grade level, while evaluating private attorneys on the basis of actual litigation experience, was arbitrary and capricious within the meaning of the APA. The court, like the District Court in *Friedman*, did not discuss the CSRA; that omission, however, is hardly surprising inasmuch as the claim in Etelson's case arose in 1970, nearly nine years before the CSRA's effective date. Review under the CSRA would therefore not have been appropriate in *Etelson*, inasmuch as the plaintiff's claim was pending prior to that statute's effective date. *See* 5 U.S.C. § 7703(b)(1) (1982); *see also* 5 C.F.R. § 1201.191(b) (1985); *Kyle v. ICC*, 609 F.2d 540 (D.C. Cir. 1980) (interpreting both the statute and the regulation).

In contrast to the silence of the District Court in *Friedman* and this court in *Etelson*, an authoritative interpretation of the CSRA's impact on preexisting avenues of judicial review was subsequently rendered in *Carducci v. Regan*, *supra*, 714 F.2d 171. In *Carducci*, this court examined in detail the remedies available to civil service employees under the CSRA. Examining this court's decisions in *Borrell v. United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982), and *Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982), the court first separated constitutional claims from nonconstitutional ones. With respect to the latter category, the court held

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[7] This court's affirmance of that decision was not embodied in a published opinion, thus rendering our decision in the *Friedman* appeal without precedential significance.

that under the regime ushered in by the CSRA, such complaints were reviewable (1) directly by the MSPB ("adverse actions"); or (2) reviewable first by the Office of Special Counsel ("prohibited personnel practices"), which could take several kinds of action including prosecuting the case before the MSPB; or (3) in rare instances, not at all (committed to agency discretion). With respect to the constitutional claims advanced in that case, the court found them inadequately briefed and therefore declined to resolve them. 714 F.2d at 177.

2

Appellants' argument based on *Friedman* and *Etelson* fails for the simple reason that neither case provides true circuit precedent on the question of the CSRA's impact on the availability of judicial review. Indeed, there was no opinion at all by this court in *Friedman, see supra* note 7; *Etelson* did not, as we discussed previously, purport to examine the CSRA inasmuch as the claim was pending prior to the effective date of that Act. Finally, both cases predate *Carducci*, which comprehensively addressed the CSRA's scheme for judicial review of nonconstitutional claims arising out of agency actions taken against federal employees.

Inasmuch as *Carducci* represents controlling precedent in this circuit, appellants make several attempts to challenge or avoid its holding. First, appellants argue that *Carducci* is wrong and should be reconsidered. As evidence of the "error" in *Carducci*, appellants rely upon not only its alleged break with the *Friedman* and *Etelson* "precedents," but its inconsistency with the First Circuit's post-*Carducci* decision in *Dugan v. Ramsay, supra*, 727 F.2d 192. In *Dugan*, the First Circuit held that despite passage of the CSRA, APA review remained available to an applicant for an ALJ position, a conclusion clearly contrary to *Carducci*. Appellants would have us follow *Dugan*. This, of course, we cannot do. *Carducci* is binding precedent which can be overruled only by the court *en banc*.

Appellants next attempt to cabin *Carducci's* scope. In this respect, appellants contend that *Carduucci* can be distinguished from *Friedman, Etelson* and *Dugan* on the obvious ground that the civil service employee in *Carducci* was not an ALJ. Renewing their argument that ALJs are distinct, appellants emphasize that ALJs' need for decisional independence dictates a higher degree of protection from coercion. Appellants assert that unless judicial review is available a "wrong thinking" ALJ could be punished and left with no effective means to counteract the coercive effect of personnel policies implemented for this illicit purpose. Appellants' Brief at 23. Appellants seek to buttress their argument by pointing out that *Friedman, Etelson* and *Dugan* all involved ALJ positions while *Carducci* did not; the difference in outcome in these cases, they contend, can be explained by the fact that ALJs are generally treated differently from civil servants who do not carry on adjudicatory functions. Moreover, appellants cite numerous statutory provisions in which ALJs are singled out for special treatment.

3

While recognizing the pivotal importance of the work of the ALJ corps, we are nonetheless unpersuaded by appellants' attempt to confer special status on ALJs beyond that expressly provided by Congress. It is, to be sure, true that Congress has often recognized the special status of ALJs. Appellants understandably go into some detail identifying numerous provisions in which Congress has singled out ALJs for special treatment. *See* Appellants' Brief at 23-27. However, as the District Court rightly observed, Congress, in outlining the elaborate procedures for review of adverse agency actions in the CSRA, expressly imposed a requirement on the MSPB that it make a determination of good cause (after an opportunity for

hearing) before the challenged "adverse action" is taken by an agency against an ALJ. *See* Order at 9, J.A. at 244, 5 U.S.C. § 7521 (1982). Tellingly, however, no special provision for ALJs was set forth by Congress with respect to review of "prohibited personnel practices." [8] Clearly, had Congress intended to treat ALJs differently as to "prohibited personnel practices," it could have done so explicitly just as it did with respect to "adverse actions." We can not and will not, to achieve what is plainly a laudable policy goal sought by appellants, add a statutory provision which the First Branch did not include.

B

Finding appellants' effort to limit *Carducci's* reach unavailing, we turn to consider their argument that even if *Carducci* could be applied to ALJs as a group, it should not apply here because appellants' claims were pending before the District Court prior to the date *Carducci* was handed down. Appellants concede that retroactive application of judicial decisions is the general rule but argue that retrospective applicability is not warranted in this case.

In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Supreme Court identified three factors as relevant to the question of nonretroactivity *vel non*:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants

[8] Appellees argue, and appellants do not contest, that a challenge to OPM's refusal to promote on the basis that it is in disregard of law (in that it is arbitrary and capricious) is a challenge to a "prohibited personnel practice." As the District Court found, "the proscription against specified personnel practices, 5 U.S.C. § 2302(a)(2)(B), include[s] those concerning promotions" and insofar as appellants "invoke the general precept of equal pay for equal work," they are claiming that OPM has committed a "prohibited personnel practice." *See* Order at 8, J.A. at 243.

> may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of retroactivity."

404 U.S. at 106-07 (citations omitted). Nothing in *Huson* mandates that all three factors be satisfied in order to decide the issue in favor of nonretroactivity; on the contrary, it appears that the Court contemplated the carrying out of a balancing process to make this determination.

Arguing from *Huson's* teaching, appellants contend that retroactive application is not mandated because (1) *Carducci* broke with precedent and established a new principle of law; (2) no purpose would be served by requiring appellants to pursue alternative remedies; and (3) a substantial inequitable result would be occasioned if OPM were allowed to profit from its own delay at great expense to appellants. Specifically, appellants claim that *Carducci* established a new principle of law when, for the first time, it precluded judicial review under the APA of agency actions taken against ALJs.

Upon analysis, however, we can find no "clear past precedent" having been overruled by *Carducci*; moreover, while the precise issue presented in *Carducci* was one of the first impression, its eventual resolution had been foreshadowed by the enactment of the CSRA itself and even more clearly by two post-CSRA decisions of

this court.[9] Thus, *Carducci* does not represent the sort of dramatic reversal of past practice which was presented to the Court in *Huson*, where a party suddenly found himself subject to a shorter statute of limitations.[10]

The second *Huson* factor, whether retroactive operation would further or retard the newly adopted principle, does not favor appellants. The rationale articulated in *Carducci* is, as we have seen, that "the scheme of the CSRA would be impermissibly frustrated by permitting for lesser personnel actions not involving constitutional claims, an access to the courts more immediate and direct than the statute provides with regard to major adverse actions." 714 F.2d at 174; *see supra* page 6. That principle would be retarded, not furthered, were appellants' claim permitted to proceed in court notwithstanding the ready availability of the elaborate administrative apparatus fashioned by Congress in the CSRA.

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[9] *See Borrell v. United States Int'l Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982), and *Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982) (both cases holding that the CSRA did not affect preexisting rights to judicial review of *constitutional*, as opposed to nonconstitutional, claims).

[10] In *Huson*, the plaintiff had lost his cause of action when the District Court applied a recently decided case, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), which made a State's statute of limitations, rather than the federal common law of laches, applicable under the Outer Continental Shelf Lands Act. The Supreme Court reversed the retroactivity ruling, refusing to apply *Rodrigue* to bar the action. In addition to presenting less compelling circumstances than those presented in *Huson*, appellants' argument that the first *Huson* factor suggests *Carducci* should not be applied retroactively loses its force in view of the fact that the employee in *Carducci* itself, who was of course faced for the first time with what appellants argue was an unforeshadowed reversal of past precedent, was not entitled to a decision on the merits of his "prohibited personnel practice" claims until he first took those claims to the Office of Special Counsel. Indeed, with respect to those of Mr. Carducci's claims that the court found to be "committed to agency discretion by law," Mr. Carducci lost his cause of action altogether.

Least of all can appellants satisfy *Huson*'s third factor, namely that substantial inequity will result if *Carducci* is retroactively applied.[11] Unlike cases such as *Huson*, involving statutes of limitations, see Appellants' Brief at 38, appellants' cause of action will not be lost by our faithfully following *Carducci*'s teaching. Appellants are being required to comport themselves with Congressionally provided procedures for obtaining relief by presenting a cognizable claim to the Office of Special Counsel; they are by no means being left remediless.[12]

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[11] Appellants assert in this respect that to apply *Carducci* retroactively would be inequitable because it would allow OPM to profit from its own delay. Had OPM not waited more than 18 months to notify appellants of the status of their appeal, appellants argue with obvious force, *Carducci* would not yet have been decided. There are, however, two problems with this argument: first, as the District Court observed, "had plaintiffs [initially] pursued their statutory remedy and filed a complaint with the Office of Special Counsel they might have learned of the denial of their appeals more promptly," Order at 10-11, J.A. at 245-46, or, we observe, obtained relief; second, it is scarcely clear that, had *Carducci* not been decided, appellants in this case would not have found themselves in the shoes of the appellant in *Carducci* whose "prohibited personnel practice" grievances were dismissed, as we have seen, for failure to exhaust through the Office of Special Counsel.

[12] Appellants contend that being forced to exhaust OSC procedures is patently unpromising, citing a letter sent by appellants' counsel to the Office of Special Counsel. The District Court did not have occasion to address the significance of this latter-day communication for the obvious reason that the letter was not sent to the OSC until February 1984, more than one month *after* the District Court issued its order dismissing appellants' claims. Appellants argue that the OSC's response, denying the petition and closing its file in the matter, illustrates "the inadequacy of the Office of Special Counsel and the hollowness of the district court's assurance that retroactive application of *Carducci* would not leave appellants without an effective avenue of relief." Appellants' Reply Brief at 16.

In our view, appellants' argument with respect to counsel's letter to the OSC is unavailing for two reasons. First, appellants fail correctly to characterize the Special Counsel's response; the OSC

C

In addition to their APA claims, appellants advance a constitutional claim in support of their challenge. Specifically, appellants contend that the glacial manner in which OPM processed their claims worked a violation of appellants' due process rights in contravention of the Fifth Amendment. The court in *Carducci* was likewise faced with a constitutionally-based claim but declined to address the contention based upon the barebones assertion of a constitutional right with virtually no elaboration or development of the contention so as to permit careful judicial evaluation of the claim.

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informed appellants that they had failed to allege a "prohibited personnel practice" in their complaint and that "matters involving position classification are not within the investigative authority of the Special Counsel absent some evidence of a prohibited personnel practice." Appellants' Reply Brief, Exhibit F. Indeed, a review of the letter reveals that while appellants' counsel contended that a "prohibited personnel practice" had occurred, their argument was undermined by their emphasis that under the classification scheme in operation at the Department of Labor as of January 1984, the "most complex, responsible and rewarding case assignments" had been taken away from them. Appellants' Brief, Exhibit E at 2. In other words, the merit system principle of equal pay for work of equal value was, the letter suggested, no longer implicated inasmuch as appellants were no longer performing GS-16 work. In a word, OSC's response to a single, somewhat imprecise letter simply does not rise to the level of an outcome-determinative event. Secondly, as we hold today in our decision in *Barnhart v. OPM*, No. 83-2324, slip op. (D.C. Cir. August 9, 1985), the OSC provides an adequate remedy for civil service employees who seek to challenge an agency action on the ground that it constitutes a prohibited personnel practice. The statutes and regulations governing the Office of Special Counsel and the MSPB strongly support the adequacy of this avenue of appeal when that avenue is properly utilized. Moreover, the OSC did not have the benefit of our decision in *Barnhart* when it received the letter from appellant's counsel, and thus there may have been some uncertainty as to the scope of the OSC's authority or, more precisely, as to what could constitute a "prohibited personnel practice."

Here too, the District Court was faced with a barebones assertion of a Fifth Amendment claim with little elaboration. In fairness to appellants, however, they finally articulated their Fifth Amendment claim more clearly on appeal, arguing in their Reply Brief that OPM's intransigence and delay in processing their complaint violated appellants' due process rights. This is, of course, terribly late in the litigation day, sufficiently so as to warrant our declining, for the reasons aptly stated in *Carducci*, to address their claims. But in any event we find this eleventh-hour elucidation of an asserted constitutional claim to be of no avail; the constitutional challenge is moot to the extent appellants' claim was grounded upon a request for injunctive relief from OPM's delay in rendering a decision. That delay has, of course, ended.[13]

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[13] Appellants contend that their constitutional claim is not entirely moot because they requested monetary relief in the form of litigation expenses and back pay. However, appellants have not yet proven entitlement either to litigation expenses or back pay and cannot do so until they prevail on the merits of their classification appeal. To address appellants' constitutional claim (that the agencies involved should be held liable for monetary damages resulting from a violation of appellants' constitutional rights) would, it seems to us, permit appellants to achieve through the back door what they cannot do directly. Moreover, as the District Court observed, any injury appellants may have sustained during the period in which they claim OPM unjustifiably delayed in acting on their appeals was occasioned, at least in part, by appellants' failure to pursue their statutory remedy by repairing to the Office of Special Counsel; had appellants followed proper procedures, they may well have learned of the denial of their appeals much earlier, if not have obtained relief. The Office of Special Counsel is available, moreover, to prosecute facially meritorious "prohibited personnel practice" complaints at no expense to employees. More fundamentally, appellants' constitutional claims, even if properly presented, perhaps could not succeed on the merits. *See, e.g., Duarte v. United States*, 532 F.2d 850, 852 (2d Cir. 1976); *Canadian Transport Co. v. United States*, 430 F. Supp. 1168, 1172-73 (D.D.C. 1977); *cf. Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 388 (D.C. Cir. 1983) (holding that suits against the United States are generally precluded under the doctrine of sovereign immunity unless

D

As a final attempt to preserve federal court jurisdiction, appellants assert that the District Court had jurisdiction (1) under the Mandamus Act, 28 U.S.C. § 1361 (1982), due to the presence of a claim that OPM was refusing to perform its statutory duty to render a decision; and (2) under amendments to the Back Pay Act, 5 U.S.C. § 5596(b)(3) (1982), due to the presence of a claim for entitlement to back pay for the period appellants allege they were wrongfully paid at the GS-15 level.

Although the District Court did not separately address the back-pay and mandamus claims, we conclude that neither claim provides a basis for jurisdiction. The mandamus claim is clearly moot. It is manifestly unnecessary to compel OPM to act on appellants' claim, inasmuch as OPM rendered its decision nearly two years ago. As if more were needed, for mandamus to lie appellants must not have an adequate alternative remedy; yet, as we have discussed at length, appeal to the OSC has been and remains open to appellants, and they have failed to demon-

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expressly and specifically waived). Arguably, appellants can recover money damages for a violation of their Fifth Amendment rights only through an action against an official acting in his individual capacity. *See Bivens, supra*, 403 U.S. 388 (1971). Although appellants included a *Bivens* claim in their District Court action, they have not appealed from the dismissal of that claim. *See supra* pages 7-8. We need not resolve this issue, however, inasmuch as appellants' claim for damages is premature, whatever its merit; we are nonetheless troubled by much the same concerns that prompted the Supreme Court in *United States v. Testan*, 424 U.S. 392 (1976), to observe that

> if the respondents were correct in their claims to retroactive classifications and money damages, many of the federal statutes —such as the Back Pay Act—that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous.

Id. at 404. Appellants implicitly acknowledge as much by including in this action a claim for back pay under the Back Pay Act.

strate the inadequacy of this avenue of appeal. *See supra* note 12; *Barnhart v. OPM*, No. 83-2324, slip op. (D.C. Cir. August 9, 1985).

The back-pay claim likewise must fail because the Back Pay Act provides that an employee cannot obtain back pay unless the employee is first "found by appropriate authority . . . to have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1) (1982). That is an issue yet to be determined, as we have seen; thus, any Back Pay Act claim is, at this juncture, premature.

In addition, it is not entirely clear that appellants could succeed on the merits of their back-pay claim. The Back Pay Act requires a *withdrawal or reduction* in pay for a cause of action to lie. *See United States v. Testan*, 424 U.S. 392, 405-07 (1976). It is not immediately apparent that any reduction or withdrawal, in the traditional sense, has occurred here; appellants seek compensation from OPM and the Department of Labor for allegedly wrongfully failing to promote appellants, rather than for actually lowering appellants' GS-level and thereby decreasing their salary and benefits. Appellants argue that a 1978 amendment to the Back Pay Act (adopted as part of the CSRA) modifying the definition of "personnel action" so as to include within that term an "omission or failure to take an action or confer a benefit," 5 U.S.C. § 5596(b)(3) (1982), provides "a remedy for persons in appellants' position." Appellants Reply Brief at 12. We observe that at least one court has decided the issue contrary to the resolution appellants urge upon us. *See Spagnola v. Stockman*, No. 82-3584, slip op. (D.D.C. May 19, 1983). We need not, however, resolve this issue in order to dispose of appellants' back-pay claim, and we therefore express no opinion as to either the impact of the 1978 amendments to the Back Pay Act or the applicability of *Spagnola* to the facts of this case. It is sufficient for our purposes that appellants have not yet

been found by an appropriate authority to have been wrongfully denied promotion.[14]

III

Due to the potential availability of relief from the Office of Special Counsel and by virtue of this court's decision in *Carducci*, we agree with the District Court that it lacked subject matter jurisdiction over most of these claims. In addition, we agree with the District Court that appellants' constitutional claim is moot (or premature) and that the claim for back pay is, at best, premature.

For the foregoing reasons, the judgment of the District Court is

Affirmed.

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[14] Appellants rely in part on *Crowley v. Shultz*, 704 F.2d 1269 (D.C. Cir. 1983). While in *Crowley* this court noted that "[i]t is accepted practice for District Courts to grant relief under the Back Pay Act even in suits that are not appeals from an administrative determination under any statutorily established appeal procedure," *id.* at 1272, this can scarcely be taken to mean that appellants can circumvent a statutorily prescribed appeal procedure designed to address just the sort of claim they present. No such question as to the utilization of administrative procedures was at issue in *Crowley*, inasmuch as the claim in that case arose prior to the effective date of the 1978 amendment to the Back Pay Act; indeed, the Government in that case did not even contest the applicability of the Back Pay Act. *Id.* at 1272-73.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 83-0354

LAWRENCE E. GRAY, *et al.*,
Plaintiffs,

v.

THE OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants.

Civil Action No. 83-0248

MELVIN WARSHAW,
Plaintiff,

v.

DONALD J. DEVINE, Director,
Office of Personnel Management, *et al.*,
Defendants.

[Filed Dec. 21, 1983]

MEMORANDUM OPINION AND ORDER

On August 4, 1981, the Office of Personnel Management (OPM) promoted 39 incumbent Administrative Law Judges (ALJs) at the Department of Labor (DOL) from the General Schedule (GS) 15 pay level to the GS-16 pay level pursuant to 5 C.F.R. § 930.204(b) (1983). Plaintiffs in both of these cases are among those GS-15 ALJs at DOL who were not promoted to GS-16 positions. They

allege that OPM should have applied 5 C.F.R. § 930.204 (a) (1983), rather than § 930.204(b),[1] to promote all GS-15 incumbent ALJs since OPM had reclassified some GS-15 duties at the GS-16 level in April, 1981, based upon a workload analysis. The ALJs who were not promoted were operating under the same "dual position" job description and performing the same work as those who were promoted. Thus, plaintiffs aver that because their positions were effectively reclassified to GS-16, which should have triggered § 930.204(a), OPM's failure to promote them contravenes the "equal pay for equal work" mandate of 5 U.S.C. § 5101 (1976).

Plaintiff Warshaw alleges further, that although he has been recommended as "best qualified" for a vacant GS-16 position, OPM refuses to recognize any such vacancy until it has fully implemented its August, 1981 reclassification by finalizing separate GS-15 and GS-16 position descriptions for all DOL ALJs and by conform-

[1] 5 C.F.R. § 930.204 provides:

"(a) When the Office of Personnel Management classifies an occupied administrative law judge position at a higher grade, the Office of Personnel Management shall direct the promotion of the incumbent administrative law judge and the promotion is effective on the date named by the Office of Personnel Management. This regulation pertains only to appointments to positions which because of their substantive and technical nature warrant a grade GS-16; the regulation does not pertain to positions which because of their managerial and administrative nature warrant a grade GS-16.

(b) No more than twice during a calendar year, an agency may notify the Office of Personnel Management that it wishes to fill a specific number of its grade GS-16 ALJ vacancies from among its grade GS-15 ALJs who are on the GS-16 ALJ register and have served as judges at the agency for at least one year. The Office of Personnel Management shall select from the grade GS-15 ALJs of that agency those ALJs who it determines are best qualified for appointment to a grade GS-16 ALJ position and shall direct their appointment by the agency to such grade GS-16 ALJ positions."

ing work assignments to the new position descriptions. As such, plaintiff Warshaw maintains that OPM is also in violation of § 930.204(b). He seeks an order from this Court directing OPM either to promote him to the GS-16 level retroactive to the date other GS-15 ALJs were promoted, or to appoint him to a vacant GS-16 position and refrain from taking any action which would injure his eligiblity for such a position.

Plaintiffs in No. 83-0354 have sued defendant Devine in his individual capacity as well as his official capacity. They allege that his failure to respond to their requests for relief for 18 months denied them procedural due process rights guaranteed by the Fifth Amendment. Thus, they seek on order from this Court (1) directing their retroactive promotions; (2) awarding back pay; (3) declaring defendants' conduct to be in violation of the Administrative Procedure Act and the Fifth Amendment to the Constitution of the United States; (4) awarding punitive damages against defendant Devine; and, (5) awarding costs and attorneys' fees.

Before the Court had the opportunity to address the various motions of the parties in these cases, the United States Court of Appeals for the District of Columbia Circuit issued its decision in *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983). This decision prompted the Court to question its jurisdiction over the plaintiffs' claims herein. After careful consideration of the parties' briefs on this issue the Court has concluded that these cases must be dismissed for lack of subject matter jurisdiction.

Carducci held that agency personnel action which is not an alleged violation of constitutional rights but which was directly reviewable by the district courts under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* (1976), before the enactment of the Civil Service Reform Act of 1978[2]

[2] Pub.L. No. 95-545, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C. (Supp. V 1981)).

(CSRA), is no longer so reviewable after the enactment of the CSRA. Carducci, an employee of the United States Customs Service, was reassigned from one position to another, purportedly because of "poor performance", but without a reduction in his grade or pay. After an unsuccessful challenge to the reassignment at the administrative level, Carducci filed a petition with the Office of Special Counsel requesting an investigation and presentation of the matter to the Merit Systems Protection Board (MSPB). The Special Counsel found that no prohibited personnel practice had occurred which would warrant MSPB consideration. Carducci then sought judicial review in district court under the APA, alleging arbitrary and capricious agency action and the violation of his right to procedural due process under the Fifth Amendment.

The Court derived the principle governing *Carducci* from its earlier opinions in *Borrell v. United States International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982), and *Cutts v. Fowler*, 692 F.2d 138 (D.C. Cir. 1982):

> [T]he exhaustive remedial scheme of the CSRA would be impermissibly frustrated by permitting far lesser personnel actions not involving constitutional claims, an access to the courts more immediate and direct than the statute provides with regard to major adverse actions.

Carducci v. Regan, 714 F.2d at 174. Carducci argued that because the Office of Special Counsel only investigates prohibited personnel practices as defined in 5 U.S.C. § 2302 (Supp. V 1981), and he had not alleged any prohibited personnel practice, his claim was outside the purview of the CSRA and, thus cognizable in federal court. The Court rejected that argument, finding that Congress' failure to include some types of nonmajor personnel action, or some bases or motivations for nonmajor

personnel action, within this comprehensive statute reflects an intent to preclude judicial relief, and renders such agency action "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1976). *Id.*

The stautory scheme outlined by the Court establishes:

> (1) for major personnel actions specified in the statute ('adverse actions'), direct judicial review after extensive prior administrative proceedings; (2) for specified minor personnel actions infected by particularly heinous motivations or disregard of law ('prohibited personnel practices'), review by the Office of Special Counsel . . .; and (3) for the specified minor personnel actions not so infected, and for all other minor personnel actions, review by neither OSC nor the courts.

Id. at 175. Since the list of specified minor personnel actions is extensive and includes "any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level," 5 U.S.C. § 2302(a)(2)(A)(x), and since the infecting basis or motivation includes violation of "any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in Section 2301," 5 U.S.C. § 2302(b)(11), which principles in turn include protection againt arbitrary action, § 2301(b)(8)(A), and "fair and equitable treatment in all aspects of personnel management," § 2301(b)(2), very few personnel actions, if any, are committed solely to agency discretion. *Id.*

The Court declined to reach Carducci's constitutional claim because it was inadequately briefed, however, it recognized that the constitutional question presented—whether the CSRA provided the exclusive entitlements of status and tenure for civil service employees—was one of "first impression and of major importance." *Id.* at 177.

The Statutory Claims

The scope of the *Carducci* ruling precludes review by this Court of those matters which plaintiffs should have addressed to the Office of Special Counsel. Plaintiffs' statutory claims, while not amounting to "adverse actions" as defined by the statute, could constitute grounds for a prohibited personnel practice claim under 5 U.S.C. § 2302 (a)(2)(A)(iv) (Supp. V 1981) (reassignment), or certainly under subsection (x) ("any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level"), since the laws and regulations allegedly violated implement the merit system principles which protect against arbitrary action, and insure fair and equitable treatment including equal pay for equal work. *See* 5 U.S.C. § 2301(b). The regulations specifically applicable to the Office of Special Counsel define "personnel action" to include a promotion, 5 C.F.R. § 1250.3(a)(2) (1983), and define "prohibited personnel practice" to include the taking or *failure to take* "any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301." 5 C.F.R. § 1250.3(b)(11) (1983). *Cf.* 5 U.S.C. § 2302(b)(11) (Supp. V 1981). Clearly, plaintiffs' allegation that defendants unlawfully failed to promote them falls within the ambit of the Special Counsel's jurisdiction.

Plaintiffs distinguish their cases from *Carducci* on the basis that the APA grants them unique privileges of judicial review because they are ALJs who must remain free to exercise independent judgment. They argue that these privileges arise from a combination of protections for ALJs provided by the APA which include: (1) the exclusion of ALJs from the definition of employees for the purpose of performance appraisal, 5 U.S.C. § 4301 (2)(D) (Supp. V 1981), 5 C.F.R. § 930.211 (1983); (2) the exclusion of ALJs from the direction or supervision of agency investigative or prosecutorial personnel, 5 U.S.C. § 554(d) (1976); (3) a ban on the performance of duties inconsistent with the ALJ function, 5 U.S.C. § 3105 (Supp. V 1981), 5 C.F.R. 930.209 (1983); (4) the assignment of cases on a rotational basis, 5 U.S.C. § 3105 (Supp. V 1981), 5 C.F.R. § 930.212 (1983); (5) the determination of their pay independent of agency recommendations or ratings, 5 U.S.C. § 5372 (Supp. V 1981), 5 C.F.R. § 930.210 (1983); and, (6) the requirement of "good cause" as determined by the MSPB after an opportunity for a hearing, before any adverse action may be taken, 5 U.S.C. § 7521 (Supp. V 1981).

The Court recognizes that independent decisionmaking by ALJs is a firmly-embedded principle in the APA. *See generally Butz v. Economou*, 438 U.S. 478 (1978). However, none of these statutory safeguards of that principle is implicated, even remotely, in plaintiffs' complaint.[3] Indeed, insofar as they invoke the general precept of equal pay for equal work, plaintiffs are seeking to have applied to them provisions of law applicable to all federal employees. As such, they must follow the prescribed procedures for invoking those provisions. The definition of positions covered by the proscription against specified personnel practices, 5 U.S.C. § 2302(a)(2)(B), including those concerning promotions, 5 U.S.C. § 2302(a)(2)(A)(ii), implicitly includes ALJ positions in failing to exclude them. This conclusion is all the more compelling in view of the specificity with which Congress expressed other CSRA provisions concerning ALJs.[4]

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[3] The Court expresses no opinion as to whether an action alleging violations of any of the particular statutory protections of ALJ independence would be cognizable in district court after Carducci v. Regan, 714 F.2d 171 (D.C. Cir. 1983).

[4] Congress could have provided expressly for district court jurisdiction over ALJ employment disputes. *De novo* review of federal employment actions alleging unlawful discrimination is available in district court. 5 U.S.C. § 7701 (Supp. V 1981).

Plaintiffs' claims should be examined in the overall context of the CSRA. Congress has designed a comprehensive federal personnel program and has a strong interest in promoting a uniform law of federal employment. That interest is furthered by vesting jurisdiction over federal employment claims in one tribunal. It would be anomalous to permit a direct appeal in district court of a personnel action less significant than removal or demotion, when a removal, demotion or other "adverse action" must be appealed administratively. Although the procedures for challenging adverse actions against ALJs differ from those for challenging similar actions against other employees (in the requirement of MSPB determination of good cause, after the opportunity for a hearing), there is no rational basis for distinguishing between ALJs and other employees with regard to the availability of judicial review for lesser personnel actions. Rather, the very existence of this analogous review mechanism for adverse actions against ALJs buttresses the conclusion reached in *Carducci* that lesser personnel actions are either reviewable by the Office of Special Counsel or, in rare instances, not at all.

It must be emphasized that these plaintiffs are not, by virtue of this decision, left without any forum in which to pursue their claims. *See supra* at 6. If the Office of Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred which requires corrective action, it may request consideration of the matter by the MSPB. 5 U.S.C. § 1206(c)(1)(A), (B) (Supp. V 1981); 5 C.F.R. 1250.1 (1983).[5] *See also* 5 C.F.R. § 1251.5(a) (1983). Adverse decisions of the MSPB may be appealed to the United States Court of Appeals for the

[5] The original jurisdiction of the MSPB includes actions brought by the Special Counsel. 5 C.F.R. § 1201.2 (1983).

Federal Circuit, 5 U.S.C. § 7703 (1976 and Supp. V 1981).[6]

The Constitutional Claim

Plaintiffs in Civil Action No. 83-0354 have alleged that OPM and defendant Devine, individually, denied them procedural due process in violation of the Fifth Amendment, in failing to notify them promptly of the decision to deny their appeals. As stated above, the *Carducci* ruling leaves open the possibility of district court jurisdiction to determine the scope of constitutional protections afforded federal employees. However, even assuming the existence of a constitutionally protected property interest in promotion to the GS-16 grade level, *see Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), had plaintiffs pursued their statutory remedy and filed a complaint with the Office of Special Council they might have learned of the denial of their appeals more promptly. Under these circumstances, plaintiffs' objection to the delay in the hearing process at OPM, such that a hearing was required, does not reach constitutional proportions. Thus, the constitutional question left unresolved in *Carducci*—whether the CSRA provides the exclusive entitlements of status and tenure for federal employees—is not presented by this case.

Moreover, plaintiffs' constitutional claim, in the nature of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), is directed primarily against defendant

[6] The mandamus statute, 28 U.S.C. § 1361, does not confer original jurisdiction in this Court given the availability of an adequate remedy under the CSRA. *See e.g.*, Haneke v. Secretary of Health, Education & Welfare, 535 F.2d 1291, 1296 n. 15 (D.C. Cir. 1976). Neither may plaintiffs rely on the Back Pay Act, 5 U.S.C. § 5596 (Supp. IV 1980), to support jurisdiction under 28 U.S.C. § 1346, since they concede that they are entitled to back pay only if they succeed on the merits of their claims. Plaintiffs' Memorandum in Civil Action No. 83-0354 entitled "Defendants' motion to dismiss Plaintiffs' back pay claim should be rejected." *See, e.g.*, United States v. Connolly, 716 F.2d 882, 887 (Fed. Cir. 1983).

Devine in his individual capacity.[7] Defendant Devine has moved to dismiss plaintiffs' allegations against him in his individual capacity on the ground that he is protected from suit by the doctrine of official immunity. Defendant notes, alternatively, that plaintiffs may not maintain a suit against defendant Devine for personal damages because the CSRA provides the exclusive remedy for constitutional violations in the federal personnel area. In *Bush v. Lucas,* —— U.S. ——, 103 S. Ct. 2404 (1983), the Supreme Court unanimously held that the existence of an elaborate, comprehensive legislative scheme, governing federal employment matters, which prohibits arbitrary action and provides procedures by which improper action may be redressed, precludes an individual damages remedy for constitutional violations, even assuming the presence of a constitutional violation and that the statutory remedies are not as effective as a damages remedy might be. *See also Gleason v. Malcom,* 718 F.2d 1044, 1048 (11th Cir. 1983). In view of this unambiguous decision and the remedy afforded under the CSRA, plaintiffs' constitutional claim does not provide an independent basis for subject matter jurisdiction.

Accordingly, upon consideration of the memoranda of the parties concerning this Court's jurisdiction over these cases, the motion to dismiss Donald J. Devine in his individual capacity and plaintiffs' opposition thereto, and the entire record herein, it is, by the Court, this 21st day of December, 1983

ORDERED that the motion to dismiss Donald J. Devine in his individual capacity in Civil Action No. 83-0354 shall be, and the same hereby is, granted; and it is further

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[7] Although plaintiffs request that the defendants' conduct be adjudged in violation of the Fifth Amendment, they seek the remedy of punitive damages against defendant Devine.

ORDERED that these cases shall be and they hereby are dismissed for lack of subject matter jurisdiction.

/s/ Joyce Hens Green
JOYCE HENS GREEN
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action No. 83-00354

No. 84-5052

LAWRENCE E. GRAY, *et al.*,
Appellants

AUGUSTUS A. SIMPSON, JR.

v.

OFFICE OF PERSONNEL MANAGEMENT,
an Agency of the U.S. Government, *et al.*

Appeal from the United States District Court
for the District of Columbia

[Filed Aug. 9, 1985]

Before: ROBINSON, Chief Judge, STARR, Circuit Judge,
and BRYANT *, Senior District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 294(d).

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: August 9, 1985

Opinion for the Court filed by Circuit Judge Starr.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1985

CA No. 83-00354

No. 84-5052

LAWRENCE E. GRAY, *et al.*

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*

[Filed Oct. 7, 1985]

Before: Robinson, Chief Judge; Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges; and Bryant, United States Senior District Judge for the District of Columbia

ORDER

The suggestion for rehearing *en banc* of appellants Lawrence E. Gray, et al., has been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied

Per Curiam
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

STATUTES

5 U.S.C. 554(d)

* * * *

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

* * * *

5 U.S.C. 701 *et seq.*

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the

Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that

the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * * *

5 U.S.C. 3105

§ 3105. Appointment of administrative law judges

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

5 U.S.C. 4301(2)(D)

§ 4301. Definitions

For the purpose of this subchapter—

* * * *

(2) "employee' means an individual employed in or under an agency, but does not include—

* * * *

(D) an administrative law judge appointed under section 3105 of this title;

* * * *

5 U.S.C. 5101

§ 5101. Purpose

It is the purpose of this chapter to provide a plan for classification of positions whereby—

(1) in determining the rate of basic pay which an employee will receive—

(A) the principle of equal pay for substantially equal work will be followed; and

(B) variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed and to the contributions of employees to efficiency and economy in the service; and

(2) individual positions will, in accordance with their duties, responsibilities, and qualification requirements, be so grouped and identified by classes and grades, as defined by section 5102 of this title, and the various classes will be so described in published standards, as provided by section 5105 of this title, that the resulting position-classification system can be used in all phases of personnel administration.

* * * *

5 U.S.C. 5372

§ 5372. Administrative law judges

Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings and in accordance with subchapter III of this chapter and chapter 51 of this title.

5 U.S.C. 7513

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be

maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 U.S.C. 7521

§ 7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are—

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include—

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1206 of this title.

REGULATIONS (5 C.F.R.)

§ 930.204 Promotion.

(a) When the Office of Personnel Management classifies an occupied administrative law judge position at a higher grade, the Office of Personnel Management shall direct the promotion of the incumbent administrative law judge and the promotion is effective on the date named by the Office of Personnel Management. This regulation pertains only to appointments to positions which because of their substantive and technical nature warrant a grade GS-16; the regulation does not pertain to positions which because of their managerial and administrative nature warrant a grade GS-16.

(b) No more than twice during a calendar year, an agency may notify the Office of Personnel Management that it wishes to fill a specific number of its grade GS-16 ALJ vacancies from among its grade GS-15 ALJs who are on the GS-16 ALJ register and who have served as judges at the agency for at least one year. The Office of Personnel Management shall select from the grade GS-15 ALJs of that agency those ALJs who it determines are best qualified for appointment to a grade GS-16 ALJ position and shall direct their appointment by the agency to such grade GS-16 ALJ positions.

§ 930.210 Pay

(a) OPM shall classify administrative law judge positions in accordance with the regulations and procedures adopted by OPM for classifications under chapter 51 of title 5, United States Code. OPM shall make these classifications independently of agency recommendations and ratings.

(b) An administrative law judge is entitled to within-grade increases in accordance with Part 531 of this chapter, except that the requirement that his work be of an

acceptable level of competence as determined by the head of his agency does not apply.

(c) An agency shall not grant a quality increase under section 5336(a) of title 5, U.S.C., or a monetary or honorary award under section 4503 of title 5, U.S.C., for superior accomplishment by an Administrative Law Judge in the performance of adjudicatory functions.

(d) Upon appointment, an administrative law judge shall be paid at the minimum rate of the grade approved by OPM unless he is eligible for a higher rate because of prior service.

No. 85-969

In the Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE E. GRAY, ET AL., PETITIONERS

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978 precludes judicial review of personnel claims by federal employees under the Administrative Procedure Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-969

LAWRENCE E. GRAY, ET AL., PETITIONERS

v.

OFFICE OF PERSONNEL MANAGEMENT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 771 F.2d 1504. The opinion of the district court (Pet. App. 23a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 34a-35a) was entered on August 9, 1985, and a petition for rehearing was denied on October 7, 1985 (Pet. App. 36a). The petition for a writ of certiorari was filed on December 6, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are three Administrative Law Judges in the Department of Labor. In August 1981, 39 of their colleagues were promoted from the GS-15 pay level to GS-16 pursuant to a reorganization plan issued by the

Office of Personnel Management (OPM). Petitioners filed an appeal with OPM in late 1981, contending that various statutory and regulatory provisions entitled them to be promoted as well. Upon investigating petitioners' complaint, OPM determined that the Department had failed properly to implement the reorganization plan. Accordingly, OPM froze additional promotions and determined not to act on individual appeals until the entire situation could be resolved. Pet. App. 2a-5a.

In February 1983, petitioners filed this action in the United States District Court for the District of Columbia, seeking, inter alia, an injunction compelling OPM to direct their promotions and back pay for the difference between GS-16 and GS-15 benefits retroactive to August 1981.[1] They contended primarily that OPM's failure to promote them violated applicable personnel regulations and the requirement that they receive "equal pay for substantially equal work." 5 U.S.C. 5101(1)(A). The district court dismissed the complaint for want of subject matter jurisdiction. Pet. App. 23a-33a. Relying on *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983), the district court held that the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978 (CSRA) precludes direct judicial review of petitioners' claims under the Administrative Procedure Act (APA). Pet. App. 25a-30a.

2. The court of appeals affirmed. Pet. App. 1a-22a.[2] The court of appeals concluded that *Carducci* was dispositive of

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[1]The complaint of another ALJ, Melvin Warshaw, was consolidated with petitioners' action in the district court and on appeal. Pet. App. 6a, 7a. Warshaw has not sought review in this Court.

[2]Following the district court's decision, OPM was able to approve several additional GS-16 positions for Department of Labor ALJs, and petitioners were among those who were promoted. See Pet. App. 19a; Gov't C.A. Br. 7, 38-39. Petitioners continued this action apparently in the hopes of obtaining back pay and certain other benefits.

petitioners' claims under the APA; it rejected petitioners' argument that ALJs should be excepted from the *Carducci* rule on the ground that such an exception would improperly "confer special status on ALJs beyond that expressly provided by Congress." Pet. App. 13a. The court of appeals also noted that petitioners "are by no means being left remediless" because they are able to present their claims to the Special Counsel of the Merit Systems Protection Board, who is obligated to investigate claims of prohibited personnel practices and is authorized to seek corrective action where such practices have been found. *Id.* at 17a (footnote omitted); see 5 U.S.C. 1206; *Barnhart* v. *Devine*, 771 F.2d 1515, 1525 (D.C. Cir. 1985). Accordingly, the court of appeals held that "the ready availability of the elaborate administrative apparatus fashioned by Congress in the CSRA" (Pet. App. 16a) precludes judicial review of petitioners' claims under the APA.

ARGUMENT

Petitioners argue (Pet. 5-14) that they are entitled to direct judicial review of their nonconstitutional claim that they should have been promoted from GS-15 to GS-16 earlier than they in fact were, notwithstanding the comprehensive administrative remedial scheme established by Congress in the CSRA.[3] The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals that has considered similar minor personnel claims. Moreover, this Court has recently declined to review a contention identical to petitioners' in *Pinar* v. *Dole*, No. 84-1167 (Apr. 15, 1985). See also *Krodel* v. *Young*, cert. denied, No. 84-1642 (Oct. 7, 1985); *Cazalas*

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[3]Petitioners do not challenge the disposition of their constitutional claims, which were patently without merit. See Pet. 3 n.2; Appellants' C.A. Br. 3 n.2; Pet. App. 18a-19a & n.13, 31a-32a.

v. *United States Department of Justice,* cert. denied, No. 84-56 (Feb. 19, 1985). There is no reason for a different result here.[4]

As petitioners concede (Pet. 5), the overwhelming weight of appellate authority holds that the Civil Service Reform Act of 1978 precludes direct judicial review under the APA of personnel claims by federal employees. See, *e.g., Weatherford* v. *Dole,* 763 F.2d 392 (10th Cir. 1985); *Pinar* v. *Dole,* 747 F.2d 899, 912-913 (4th Cir. 1984), cert. denied, No. 84-1167 (Apr. 15, 1985); *Veit* v. *Heckler,* 746 F.2d 508, 510-511 (9th Cir. 1984); *Carducci* v. *Regan,* 714 F.2d 171, 173-175 (D.C. Cir. 1983); *Broadway* v. *Block,* 694 F.2d

[4]Although neither the parties nor the court of appeals addressed the issue, we note that petitioners properly took their appeal to the District of Columbia Circuit. Petitioners sought money damages (in addition to prospective relief) and relied in part on 28 U.S.C. 1346 as a basis for jurisdiction in the district court. See C.A. App. 20. This claim, however, was wholly without merit: "Congress has not made available to a party wrongfully classified the remedy of money damages through retroactive classification." *United States* v. *Testan,* 424 U.S. 392, 403 (1976); see also 5 U.S.C. 5596(b)(1) (back pay available only where employee has suffered the "withdrawal or reduction" of his pay); 5 U.S.C. 5596(b)(2) (back pay not available with respect to "any reclassification action"); Pet. App. 19a-20a n.13, 21a. Thus, while the Federal Circuit has exclusive jurisdiction over appeals where the jurisdiction of the district court is based on 28 U.S.C. 1346, see 28 U.S.C. 1295(a)(2), the frivolous nature of petitioners' claim for monetary relief justifies the District of Columbia Circuit's retention of jurisdiction here. See *Van Drasek* v. *Lehman,* 762 F.2d 1065, 1070-1071 & n.9 (D.C. Cir. 1985); cf. *Maier* v. *Orr,* 754 F.2d 973, 982 (Fed. Cir. 1985) (a plaintiff's "mere recitation of a basis for jurisdiction [cannot] alter the scope of [the Federal Circuit's] statutory mandate"). There is accordingly no basis on which to grant the petition and order the case remanded for transfer to the Federal Circuit pursuant to 28 U.S.C. 1631, a course that this Court has recently followed in cases in which it determined that the regional court of appeals lacked jurisdiction under 28 U.S.C. 1295(a)(2). See *Chula Vista City School District* v. *Bennett,* No. 85-833 (Jan. 27, 1986); *Pacyna* v. *Marsh,* No. 84-1706 (Jan. 21, 1986); *Ballam* v. *United States,* No. 84-1750 (Jan. 21, 1986). But see *United States* v. *Squillacote,* cert. denied, No. 84-1284 (Apr. 15, 1985).

979, 986 (5th Cir. 1982); see also *Schrachta* v. *Curtis,* 752 F.2d 1257 (7th Cir. 1985); *Hallock* v. *Moses,* 731 F.2d 754 (11th Cir. 1984); *Braun* v. *United States,* 707 F.2d 922 (6th Cir. 1983); cf. *Bush* v. *Lucas,* 462 U.S. 367 (1983) (in view of civil service remedies, federal employee may not bring *Bivens* action against his superiors).[5]

These decisions are plainly correct. In the CSRA, Congress prescribed "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations." *Bush* v. *Lucas,* 462 U.S. at 388. The statute provides that employees subject to particularly serious deprivations, such as removal or lengthy suspension, are entitled to obtain administrative review before the Merit Systems Protection Board (MSPB) and judicial review of the Board's decision. 5 U.S.C. 7512, 7513(d), 7703(a)(1). Employees also have recourse to the Special Counsel, whose function is to ensure the effective implementation of merit systems principles, which require, inter alia, "fair and equitable treatment," "[e]qual pay * * * for work of equal value," and "protect[ion] against arbitrary action, personal favoritism, or coercion for partisan

[5]In *Burroughs* v. *OPM,* 764 F.2d 1300 (1985), a panel of the Ninth Circuit held that 28 U.S.C. 1361 permits judicial review of personnel claims via mandamus. The court of appeals, however, failed to recognize the significance of its earlier decision in *Veit* v. *Heckler, supra,* and it mistakenly relied on a 1976 decision of the District of Columbia Circuit, *Haneke* v. *Secretary of Health, Education & Welfare,* 535 F.2d 1291, for the proposition that classification claims may be reviewed by way of mandamus, a view since rejected by that court in light of the procedures established in the CSRA. See *Barnhart* v. *Devine,* 771 F.2d 1515 (D.C. Cir. 1985). The government has filed a petition for rehearing in *Burroughs;* the court of appeals has called for a response but has not yet acted on the petition. The Ninth Circuit has recently reaffirmed its holding in *Veit* v. *Heckler, supra,* that "in enacting the C.S.R.A. Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the statute." *Lehman* v. *Morrissey,* 779 F.2d 526, 527-528 (1985).

political purposes." 5 U.S.C. 2301(b)(2), (3) and (8)(A); see 5 U.S.C. 1204, 1206; page 3, *supra*. Where the Special Counsel decides to prosecute a claim before the MSPB, the employee may obtain judicial review of an adverse decision by the Board; however, should the Special Counsel find the claim unmeritorious following his investigation, Congress has not provided for further review. See generally *Perez* v. *Army & Air Force Exchange Service*, 680 F.2d 779, 787-788 (D.C. Cir. 1982).

In view of this carefully crafted scheme, the courts of appeals have properly concluded that Congress's "failure to include some types of nonmajor personnel action within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available." *Carducci* v. *Regan*, 714 F.2d at 174 (footnote omitted). Similarly, in *Pinar* v. *Dole*, *supra*, the court held that "[t]he absence of a provision for direct judicial review of prohibited personnel actions among the carefully structured remedial provisions of the CSRA is evidence of Congress' intent that no judicial review in district court be available." 747 F.2d at 910; *id.* at 912 (relying on 5 U.S.C. 701(a)(1) (judicial review unavailable where the relevant statute "precludes judicial review") and 5 U.S.C. 701(a)(2) (judicial review unavailable where "agency action is committed to agency discretion by law")); see also *Veit* v. *Heckler*, 746 F.2d at 511 ("the comprehensive nature of the procedures and remedies provided by the CSRA indicates a clear congressional intent to permit federal court review as provided in the CSRA or not at all"); *Broadway* v. *Block*, 694 F.2d at 986 ("declin[ing] to allow an employee to circumvent this detailed scheme governing federal employer-employee relations by suing under the more general APA").

The conclusion that the CSRA, taken as a whole, establishes Congress's intent to preclude direct judicial review of personnel actions under the APA is faithful to this Court's

admonition that "[w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block* v. *Community Nutrition Institute*, No. 83-458 (June 4, 1984), slip op. 5. In holding that "the presumption favoring judicial review of administrative action may be overcome by inference of intent drawn from the statutory scheme as a whole," the Court emphasized in *Community Nutrition Institute* that " 'clear and convincing evidence' " of an intent to preclude review is not required "in the strict evidentiary sense." *Id.* at 9, 10. Rather, review is unavailable whenever "the congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.' " *Id.* at 10 (citation omitted).[6] That intent is plainly apparent here in light of Congress's determination in the CSRA not to authorize judicial review of classification decisions made by OPM under 5 U.S.C. 5112(a). Cf. *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) ("[i]n the context of the [Medicare] statute's precisely drawn provisions," Congress's "fail[ure] to authorize further review" of certain determinations "provides persuasive evidence that Congress deliberately intended to foreclose further review of such claims").

Moreover, permitting review in circumstances such as these would lead to the anomaly that minor personnel claims would be directly reviewable in federal court, while employees with far more serious claims, such as removal, would be required to proceed before the MSPB. And it would be particularly peculiar to permit suits under the APA, with review in the regional courts of appeals, because

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[6]Petitioners' repeated insistence (Pet. 6, 7, 8-9) on "clear and convincing evidence" of Congress's intent and on an "express" intention to preclude review all but ignores this Court's comprehensive discussion in *Community Nutrition Institute*.

that would frustrate Congress's efforts to centralize judicial consideration of federal personnel claims in the Federal Circuit. See 28 U.S.C. 1295(a)(9).[7]

The case on which petitioners rely for their claim of a conflict, *Dugan* v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984), is distinguishable.[8] That case allowed review of a substantial

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[7]Petitioners' contention (Pet. 9) that direct judicial review of their claim is required because they would not ultimately be able to obtain review of a decision by the Special Counsel rejecting their claim ignores the fact that Congress's decision not to provide judicial review in these circumstances reflects a balance of competing policy considerations, such as the severity of the deprivation, the disruption to the ability of agencies to carry out their mission caused by judicial intrusion into largely discretionary, day-to-day personnel decisions, and the burden that would be imposed on the federal courts if they were required to act as the tribunal of first resort for review of the myriad of minor personnel claims that inevitably arise in a workforce as large as the federal government's. Thus, even if petitioners' "civil service remedies [are] not as effective as" an action under the APA, *Bush* v. *Lucas*, 462 U.S. at 372, Congress's decision in the CSRA that judicial review of certain types of claims is, on balance, unwarranted must be controlling. Finally, as the court of appeals noted (Pet. App. 17a-18a), petitioners may still be able to obtain relief through the Special Counsel.

[8]This Court denied certiorari in *Pinar* v. *Dole*, No. 84-1167 (Apr. 15, 1985), notwithstanding the claim of a conflict with *Dugan*. See 84-1167 Pet. 7. Petitioners also contend (Pet. 10-14) that *Dugan* and certain earlier cases of the District of Columbia Circuit establish a special exception to nonreviewability for ALJs. *Dugan*, however, nowhere relies on special considerations involving ALJs in holding that the refusal to hire an applicant for an ALJ position is reviewable under the APA (see 727 F.2d at 194-195), and the court of appeals in this case correctly determined that its own decisions on which petitioners rely are not controlling (Pet. App. 12a-13a). As the court of appeals recognized (*id.* at 13a-14a), Congress established special provisions governing review of serious actions taken against ALJs, 5 U.S.C. 7521, but not minor claims such as the one at issue here. While ALJs undeniably play an important role in the administration of federal regulatory regimes, it would be inconsistent with Congress's decision in Section 7521 to grant them a significant degree of additional protection, but no more, to confer on ALJs the unique benefit of judicial review of minor personnel claims. Should petitioners and their supporting amicus believe that

deprivation, the refusal to hire an applicant, rather than the comparatively minor claim presented here that petitioners were not promoted in a timely fashion. See *Tucker* v. *Defense Mapping Agency*, 607 F. Supp. 1232, 1241 n.7 (D.R.I. 1985) (distinguishing *Dugan* as involving an applicant for employment and concluding that "regular [federal] employees * * * are barred from the pursuit of remedies alien to the CSRA scheme").[9] Indeed, the court of appeals in *Dugan* failed to discuss or even cite *Carducci* v. *Regan*, *supra*, and *Broadway* v. *Block*, *supra*. Furthermore, the government in *Dugan* did not argue, as we do here, that the employee should have sought relief before the Special Counsel. See 727 F.2d at 194. It is also significant that the court of appeals in *Dugan* required "clear and convincing evidence" of an intent to preclude review and reasoned that "the law * * * almost never implies statutory preclusion of review from congressional silence," 727 F.2d at 195, premises that are no longer wholly accurate in light of this Court's decision in *Community Nutrition Institute*, which was decided several months after *Dugan*. See page 7, *supra*. The First Circuit has not yet had the opportunity to reconsider its decision in light of *Community Nutrition Institute* and the unanimous decisions of the other courts of appeals that have considered the question. Finally, we are not aware of any case in which the First Circuit or any other court of appeals has relied on *Dugan* to permit review of a personnel

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further protections for ALJs are necessary in circumstances such as these (and they make no showing that they are), that contention is properly addressed to Congress, not to this Court.

[9]Very little remains at stake in this lawsuit. Petitioners have received their promotions, and they are not entitled to back pay. See notes 2, 4, *supra*. Apparently, all that primarily remains is whether petitioners are now entitled to a higher step level within GS-16 than they currently enjoy.

claim under the APA. For all these reasons, there is no need for the Court to resolve whatever conflict might exist at this time.[10]

[10]Petitioners argue for the first time in this litigation (Supp. Br. 1-5) that 5 U.S.C. 559 requires that their claim be subject to judicial review. There is, of course, no excuse for petitioners' failure to discover this 30 year old statute until "a week and a half after [they] filed for a writ of certiorari" (Supp. Br. 3), and they do not even attempt to suggest the sort of "exceptional circumstances" that alone might justify this Court's consideration of such a tardily presented contention. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); see also, *e.g.*, *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, their argument, which would require the Court to overrule its recent decision in *Community Nutrition Institute*, is without merit. Section 559 merely states a rule of construction requiring that Congress's intention to preclude judicial review be clear. *Association of Data Processing Service Organizations, Inc.* v. *Board of Governors of the Federal Reserve System*, 745 F.2d 677, 686 (D.C. Cir. 1984); *Attorney General's Manual on the Administrative Procedure Act* 139 (1947). As this Court has emphasized, Section 559 does not "require the Congress to employ magical passwords in order to effectuate an exemption from the [APA]." *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955). Accordingly, Section 559 does not prevent Congress from overcoming the presumption in favor of judicial review by establishing a comprehensive alternative remedial scheme, as here. None of the cases on which petitioners rely is to the contrary. See, *e.g.*, *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 51 (1955) (statutory provision that deportation orders would be "final" did not preclude review under the APA).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1986

(3)

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Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONERS

Pursuant to Rule 22.6, petitioners file this supplemental brief in support of their petition for a writ of certiorari in order to inform the Court of the existence of newly discovered statutory authority which petitioners believe is dispositive of the question presented for review. The controlling statute is 5 U.S.C. § 559, Section 12 of the Administrative Procedure Act, which provides, in pertinent part, as follows:

> *Subsequent statute may not be held to supersede or modify* this subchapter, *chapter 7*, Sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of Section 5335(a)(B) of this title that relate to administrative law judges, *except to the extent that it does so expressly.*

5 U.S.C. § 559 (1982) (emphasis added). The phrase "chapter 7" refers to Sections 701 through 706 of Title

5 of the United States Code, those sections of the Administrative Procedure Act that grant a right of judicial review to persons—like petitioners—injured by arbitrary and capricious government conduct. In language that could hardly be clearer, Congress, in the above-quoted section, has instructed the courts not to hold that statutes enacted after the Administrative Procedure Act—such as the Civil Service Reform Act of 1978—"supersede or modify" the right to review granted by Sections 701 through 706 unless they do so *expressly*.[1]

This instruction is dispositive of petitioners' claim that they are entitled to sue the Office of Personnel Management in federal district court because of OPM's failure to direct their promotions in 1981. Petitioners have consistently argued that the creation by Congress in 1978 of the Merit Systems Protection Board and the Office of Special Counsel did not extinguish their pre-existing right under Sections 701 through 706 of the APA to seek direct judicial review in district court of OPM's unlawful failure to direct their promotions. To date, petitioners have been denied a judicial forum for their claims on the ground that the "exhaustive remedial scheme" of the CSRA impliedly precluded judicial review under the APA. *See Carducci v. Regan*, 714 F.2d 171, 174 (D.C. Cir. 1983).

Petitioners have already demonstrated that the "clear and convincing" evidence test applicable to preclusion of judicial review as developed by this Court in the *Abbott Laboratories* line of cases has not been met here. (Petition at 7-9.) It is now apparent, however, that even more than "clear and convincing" evidence of congressional intent is required to preclude a right to judicial review

[1] Significantly, the specific statutory sections referred to in 5 U.S.C. § 559 focus on administrative law judges. This is further support for petitioners' argument that the Civil Service Reform Act of 1978 does not bar suits by ALJs under Sections 701 through 706 of the APA. (Petition at 10-14).

granted by Chapter 7 of the APA. Section 559 mandates that before a court withdraws a right to judicial review granted by Chapter 7 it must find *express* language in a superseding statute that Congress intended such a result. There simply is no such *express* language in the Civil Service Reform Act of 1978.

Interestingly, not one of the ten circuits which to date have considered the relationship of the APA-granted right of judicial review and the CSRA has discussed the relevance of Section 559 to the question of preclusion. Indeed, counsel for petitioners first learned of the existence of Section 559 a week and a half after petitioners filed for a writ of certiorari. Believing Section 559 to be dispositive of the issue at hand, petitioners' counsel notified the Solicitor General's office of this newly-discovered statutory authority and undertook the filing of this supplemental brief.

Although petitioners only recently learned of Section 559, this Court has applied it on a number of occasions in circumstances remarkably similar to those at hand. *See Rusk v. Cort*, 369 U.S. 367 (1962); *Marcello v. Bonds*, 349 U.S. 302 (1955); *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955). The *Shaughnessy* case is especially apposite.

In *Shaughnessy*, the Court considered the effect of the Immigration and Nationality Act of 1952 on an alien's right to judicial review under the APA. 349 U.S. at 50. The Court observed that the purpose of § 10[2] and § 12[3] of the Administrative Procedure Act

> was to remove obstacles to judicial review of agency action under subsequently enacted statutes like the 1952 Immigration Act.

[2] Section 10 of the APA contained the judicial review provisions which since have been codified at 5 U.S.C. §§ 701 through 706.

[3] Section 12 of the APA has been codified at 5 U.S.C. § 559.

349 U.S. at 51. As a result, said the Court, the judicial review provisions of the APA must be given a "hospitable" interpretation. *Id.* Finding that there was no language in the 1952 Immigration Act which " 'expressly' supersedes or modifies the expanded right of review granted by § 10 of the [APA]," the Court held that the 1952 Immigration Act did not eliminate "the [APA] right of judicial review in whole or in part." *Id.* The Court found its construction of the two acts to be "more in harmony with the generous review provisions" of the APA than a construction denying judicial review. *Id. Accord Rusk v. Cort*, 369 U.S. 367, 379-380 (1962) ("the teaching of [*Shaughnessy*] . . . is that the Court will not hold that the broadly remedial provisions of the Administrative Procedure Act are unavailable to review administrative decisions under the 1952 [Immigration] Act in the absence of clear and convincing evidence that Congress so intended.") *Cf. Marcello v. Bonds*, 349 U.S. 302, 309 (1955) (holding that the 1952 Immigration Act's hearings provisions superseded those found in Sections 5, 6 and 7 of the APA where Section 242 of the Immigration Act expressly stated that its procedure "shall be the sole and exclusive procedure for determining the deportability of an alien under this section."). *See also Benton v. United States*, 488 F.2d 1017, 1023-24 (Ct. Cl. 1973) (holding that a 1956 amendment to the Civil Service Retirement Act providing that Civil Service Commission decisions were not subject to judicial review did not supersede Section 11 of the APA requiring a hearing on the record before removal of a hearing examiner where the 1956 amendment "contained no express language modifying Section 11 of the APA and, in fact, made no reference whatever to Section 11").

Petitioners respectfully urge that Section 559, as interpreted by this and other courts in cases like *Shaughnessy* and *Benton*, requires a determination that petitioners are entitled to seek judicial review of their claims

against OPM in federal court. To hold otherwise would be to ignore the clear mandate of Congress that such a right to judicial review not be eliminated absent *express* congressional language to that effect. There is neither "express" language nor even "clear and convincing" evidence in the CSRA showing that Congress intended to remove from petitioners their right to judicial review under Sections 701 through 706 of the APA. Accordingly, it was error for the lower courts to hold that petitioners' right of review had been taken away by the CSRA.

CONCLUSION

For the above reasons, as well as the reasons stated in their petition for a writ of certiorari, petitioners respectfully request that the Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit entered in this case. In the alternative, petitioners request that the Court remand this case to the Court of Appeals for rehearing en banc to decide whether 5 U.S.C. § 559 requires a finding that petitioners are entitled to judicial review under Sections 701 through 706 of the APA.

Respectfully submitted,

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to resolve a serious conflict among the circuits regarding whether the Civil Service Reform Act of 1978 (CSRA) bars suits by federal employees, and particularly by administrative law judges, under Section 701 *et seq.* of the Administrative Procedure Act alleging arbitrary and capricious agency personnel action.

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BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

This amicus brief is submitted by the Federal Administrative Law Judges Conference (FALJC) in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

REASONS FOR GRANTING THE WRIT

The petition for a writ of certiorari notes two reasons for granting certiorari in this case:

> 1. A direct conflict between the decision of the First Circuit in *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984) and the decision of the D.C.

Circuit in *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983), and its progeny in other circuits,[1] as well as the decision of the D.C. Circuit in this case.

2. The need for this Court to preserve the unique status of federal administrative law judges and their access to the courts to redress arbitrary and capricious agency action directed against them.

Either of these grounds justifies review; but the historic role of this Court in assuring the efficacy of the independent administrative judiciary is of particular concern to FALJC.[2] FALJC files this *amicus* brief to encourage the Court to issue a writ of certiorari to assure the continued access of ALJs to the courts in order to preserve the independence and integrity of their adjudicative functions.

This case presents important issues concerning the access of administrative law judges to the courts to prevent arbitrary and capricious actions against them by the Office

[1]See *Pinar v. Dole*, 747 F.2d 899, 913 (4th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985); *Broadway v. Block*, 694 F.2d 979, 986 (5th Cir. 1982); *Braun v. United States*, 707 F.2d 922, 925-27 (6th Cir. 1983); *Schrachta v. Curtis*, 752 F.2d 1259, 1260 (7th Cir. 1985); *Carter v. Kurzejeski*, 706 F.2d 835, 840 (8th Cir. 1983); *Veit v. Heckler*, 746 F.2d 508, 511 (9th Cir. 1984); *Weatherford v. Dole*, 763 F.2d 392, 394 (10th Cir. 1985); *Hallock v. Moses*, 731 F.2d 754, 757-58 (11th Cir. 1984).

[2]FALJC is an organization of approximately 600 federal administrative law judges from virtually every federal administrative agency or department that employs administrative law judges. Under its constitution and by-laws, FALJC exists "to foster faithful, efficient, and effective performance of the functions assigned to Administrative Law Judges under the various statutes governing Federal administrative proceedings" and "to advance the professional standing, education and welfare of the Administrative Law Judges employed by the Government of the United States."

of Personnel Management (OPM) or the agencies in which they serve. See, *e.g.*, *Nash v. Califano*, 613 F.2d 10 (2d Cir. 1980); *Association of Administrative Law Judges v. Heckler*, 594 F.Supp. 1132 (D.D.C. 1984); *Gulan v. Heckler*, 583 F.Supp. 1010 (N.D. Ill. 1984); *Bono v. Social Security Administration*, C.A. No. 77-0819-CV-N (W.D. Mo., settled June 19, 1979), cited by *Nash v. Califano, supra*. Such access is essential in order to preserve the independence and integrity of the administrative law judge system established by the Administrative Procedure Act and heretofore protected by this Court and the federal judiciary in general. *Butz v. Economou*, 438 U.S. 478 (1978); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

The federal administrative judiciary derives its existence from the Administrative Procedure Act, which was designed to protect and insulate administrative law judges from the agencies for which they serve and to assure the fact and appearance of fair and independent decisionmaking in administrative hearings under that Act. This Court has oft recognized the importance of protecting that structure and the infant administrative judiciary within it. In *Butz v. Economou*, 438 U.S. 478, 513-14 (1978), the Court held:

> "There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. See §556(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before

him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work, see, *e.g., Wong Yang Sung v. McGrath,* 339 U.S. 33, 36-41 (1950), and because they were often subordinate to executive officials within the agency, see *Ramspeck v. Federal Trial Examiners Conference,* 345 U.S. 128, 131 (1953). Since the securing of fair and competent hearing personnel was viewed as 'the heart of formal administrative adjudication,' Final Report of the Attorney General's Committee on Administrative Procedure 46 (1941), the Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. 5 U.S.C. §3105 (1976 ed.). When conducting a hearing under §5 of the APA, 5 U.S.C. §554 (1976 ed.), a hearing examiner is not responsible to or subject to the supervision or direction of employees or agents engaged in the performance of investigative or posecution functions for the agency. 5 U.S.C. §554(d)(2) (1976 ed.). Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. §554(d)(1). Hearing examiners must be assigned to cases in rotation so far as is practicable. §3105. They may be removed only for good cause established and

determined by the Civil Service Commission after a hearing on the record. §7521. Their pay is also controlled by the Civil Service Commission.

> "In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review."

In *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248, 250 (1980), the Supreme Court noted that "the administrative law judge . . . performs the function of adjudicating child labor violations" and that "it is the judge whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."

The decision below threatens the viability of that structure by subjecting ALJs to unreviewable agency action. We submit that Congress did not intend such a result and that such a result should not be permitted in the absence of clear Congressional intent in the CSRA. Such clear Congressional intent cannot be shown and does not exist.

We will not repeat the legal arguments of the petitioners' brief, except to note that despite all of the Court of Appeals decisions on the question of whether the Civil Service Reform Act bars access to the Courts, only two cases — *Dugan* and the instant case — have confronted the question of whether the CSRA bars such access by

administrative law judges; and in those cases the courts came to diametrically opposite conclusions. In *Dugan* the court permitted a prospective ALJ to obtain judicial review of arbitrary and capricious agency action denying his application. In this case below the Court of Appeals for the District of Columbia Circuit denied access to the courts to sitting ALJs, while noting that such access was "plainly a laudable policy goal." (App. at 14a.) The Court of Appeals below stated that it could find no way to reach that result under the CSRA. We submit that the CSRA does not preclude such relief, and that this Court should intercede to afford such access to ALJs.

Recent events clearly demonstrate the continued need for this Court's protection of the administrative judiciary. In *Nash v. Califano,* 613 F.2d 10, 16-17 (2d Cir. 1980), the Second Circuit affirmed the standing of, and at the same time demonstrated the need for, an administrative law judge to be able to sue to protect his decisional independence from agency encroachment:

> "The APA creates a comprehensive bulwark to protect ALJs from agency interference. The independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process through which Social Security benefits are allocated by ensuring impartial decision-making. Since the independence is expressed in terms of such personal rights as compensation, tenure and freedom from performance evaluations and extraordinary review, we cannot say that ALJs are so disinterested as to lack even standing to safeguard their own independence. . . .
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> "The scrutiny and affirmative direction alleged by Nash reaches virtually every aspect of an

> ALJ's daily role. Under the Quality Assurance System and the Peer Review Program, the number of reversals, the number of dispositions, and the manner of trying and deciding each case are recorded and measured against prescribed standards. ALJ Nash and his colleagues allegedly receive mandatory, unlawful instructions regarding every detail of their judicial role. Nash, therefore, has 'the personal stake and interest that impart the concrete adverseness required by Article III.' . . .
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> "The second branch of the *Data Processing* test — the zone of interest requirement — is amply satisfied by the legislative protection for the ALJs' decisional independence, set forth above. The express prohibitions of performance evaluations and substantive review contained in 5 U.S.C. §4301, and appellant's position description promulgated by the Bureau of Hearings and Appeals, give his injury the required direct impact upon statutorily created rights. These provisions coupled with the direct, allegedly improper issuance of instructions to Nash and his fellow ALJs, make this 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant issuance of a declaratory judgment,' if the allegations are true."

In *Association of Administrative Law Judges, Inc. v. Heckler,* 594 F.Supp. 1132 (D.D.C. 1984), the District Court noted the importance of such litigation to the preservation of the ALJ's independence:

> "In sum, the ALJ's right to decision independence is qualified.

"The sole issue in this case is whether that qualified right has been violated by the now discontinued individual ALJ portion of the Bellmon Review Program, which targeted individual ALJs initially on the basis of their allowance rates and then on the basis of their own motion rates. Although the evidence at trial did not suggest that defendants intend to resume the practice of targeting high allowance ALJs for Bellmon Review, and although targeted review based upon own motion rate and grant-review rate of individual ALJs is no longer in effect, defendants have advised the ALJ corps of the possibility that Bellmon Review could be resumed. . . .

"At the same time, perhaps in response to this litigation, defendants have modified the Bellmon Review Program significantly for the better. The worthiness of defendants' stated goal of improving the quality and accuracy of decisions notwithstanding, targeting high allowance ALJs for review, counseling and possible disciplinary action was of dubious legality for at least two reasons. First, that practice was not consistent with the language of the Bellmon Amendment nor its sparse legislative history. Neither directed SSA to fucus on allowance decisions or target for review only ALJs with high allowance rates. In his introductory remarks, Senator Bellmon did state that SSA was to review the allowance decisions of those ALJs with high allowance rates but those remarks were not incorporated into the law. *See* Staff of Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess., *The Role of the Administrative Law Judge in the Title II Social Security Disability Insurance Program,* 9

(Comm. Print 1983) (Senate Comm. Print). Second, high allowance ALJs were initially targeted for review without regard to their actual own motion rates in an overboard sweep.

"The practice of targeting ALJs on the basis of own motion rates, once that data became available, did reflect defendants' stated goal of improving the quality and accuracy of ALJ decisions. However, the evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have intruded upon the factfinding process and may have influenced some outcomes. . . .

"In sum, the Court concludes, that defendants' unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants' insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as 'targeting,' 'goals' and 'behavior modification' could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide. However, defendants appear to have shifted their focus, obviating the need for any

injunctive relief of restructuring of the agency at this time."

Finally, in *Gulan v. Heckler,* 583 F.Supp. 1010, 017-18 (N.D. Ill. 1984), the District Court highlighted the nature of pressures upon ALJs which mandate access to judicial redress:

> "The ALJ's performance falls far short of the level of objective and fair justice that judges in the United States are expected to achieve. The reasons for these apparently frequent injudicial performances by HEW Administrative Law Judges are not clear although there have been suggestions that they are the result of pressures brought to bear on them by executives in the department for political and fiscal reasons.[6] If this is the case, it should stop. There is no room in our system of justice of Nazi or Soviet-type misuse and abuse of judges and no ALJ should be exposed or succumb to such pressure.

"[6]See, *e.g., Benefit Rulings Criticized,* Chi. Trib. at 6, col. 3 (Sept. 26, 1983) (the SSA is subtly intimidating judges by ordering reviews and increased caseloads unless they had a record of upholding disability payment cutoffs); *Disability-Benefit Cases Flood Courts,* Nat'l L.J. at 1 (October 17, 1983) (reporting a suit by federal administrative law judges in the State of Washington charging the SSA with pressuring law judges to reduce the number of times they reverse agency determinations and award benefits to claimants). One United States Senator notes that administrative law judges are voicing concerns about pressure being placed upon them by SSA officials and that Congress has received complaints that agencies are establishing quotas on ALJs, as well as reviewing their reversal rates of

> agency decisions. Legislation is now pending before Congress to create an independent administrative judge corps, S. 1275. Heflin, *Query: Should federal administrative law judges be independent of their agencies?,* 67 Judicature 369, 412, 413 (March 1984), *reprinted in* Chi. Daily L. Bull. at 3, col. 2 (April 2, 1984)."

Administrative law judges derive their existence and independence only from the Administrative Procedure Act and the protections ensured therein by access to the courts. They administer justice in tens of thousands of cases each year;[3] but they have no political constituency and are necessarily insulated within (and hence somewhat alienated from) the agencies in which they serve. Since ALJs exist to protect the public from overreaching by agency staff in the hearing process, they cannot depend upon vindication of their rights by the agencies alone without judicial review.[4] They do not enjoy the constitutional protections enjoyed by Article III courts. If they lack access to the courts, they are subject to direct as well as subtle intimidations and abuse by OPM and their own agencies. These facts are known to Congress;[5] and it should not be

[3]Federal Administrative Law Judge Hearings, Statistical Report for 1976-78 (Administrative Conference of the United States July 1980).

[4]See cases quoted above.

[5]See, *e.g.,* Rosenblum, "The Administrative Law Judge in the Administrative Process: Interrelations of Case Law with Statutory and Pragmatic Factors in Determining ALJ Roles," Subcommittee on Social Security of the House Committee on Ways and Means, 94th Congress, 1st Session, Recent Studies Relevant to the Disability Hearings and Appeals Crisis, pp. 171-245 (Comm. Print December 20, 1975); "Study on Federal Regulation," Senate Committee on Governmental Affairs, Volume IV, Delay in the Regulatory Process (Comm. Print July 1977), pp. 105-112. See also Social Security Administration Law Judges, Survey and Issue Paper, Subcommittee on Social Security of the House Committee on Ways and Means, 96th Congress, 1st Session (Comm. Print 1979); "The Role of the Administrative Law

assumed to have foreclosed the judges' access to the courts in the absence of the clearest Congressional statement to that effect.[6] No such statement exists.

CONCLUSION

Accordingly, FALJC requests that the Court issue a writ of certiorari as requested by the petitioners in this case.

Respectfully submitted,

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Judge in the Title II Social Security Disability Program," Report by the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs, 98th Congress, 1st Session (Comm. Print 1983).

[6]See 5 U.S.C. §559: "Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly." See also *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41 (1967); *Shaughnessy v. Pedreiro,* 349 U.S. 48, 51 (1955); *Rusk v. Cort,* 369 U.S. 367, 379-80 (1962); H. Rep. 1980, 79th Cong., 2d Sess., 41 (1946); Attorney General's Manual on the Administrative Procedure Act, p. 139 (1947).

No. 85-969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAWRENCE E. GRAY, EDWARD J. MURTY, JR.
and PETER MCC. GIESEY,
Petitioners,

v.

OFFICE OF PERSONNEL MANAGEMENT,
AN AGENCY OF THE U.S. GOVERNMENT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT

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QUESTION PRESENTED FOR REVIEW

Whether the Court below erroneously, and in conflict with other circuits, interpreted the Civil Service Reform Act of 1978 to bar suits by federal employees, under Section 701 *et seq.* of the Administrative Procedure Act alleging arbitrary and capricious agency personnel action.

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BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Treasury Employees Union (NTEU) is the third largest federal sector labor organization. Pursuant to Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, NTEU is the exclusive bargaining representative of approximately 110,000 federal employees throughout the nation. NTEU represents the employment interests of the members of its bargaining units, *inter alia*, by negotiating collective bargaining

agreements with federal agency employers, by arbitrating grievances under such agreements, and by representing them before administrative agencies and the federal courts.

Many of NTEU's members are classified in civil service positions pursuant to the Classification Act, 5 U.S.C. 5101 *et seq.* Thus, the interests of NTEU and the employees it represents will be affected by any decision in this case, which concerns the jurisdiction of the federal courts to hear federal employee challenges to their position classifications. Furthermore, the Court's decision may affect the outcome of a case now pending in the District of Columbia Circuit (*National Treasury Employees Union et al.* v. *Egger et al.*, No. 84-5594) in which NTEU and several of its members have appealed from a district court decision dismissing their complaint for the same reasons the D.C. Circuit upheld the dismissal in the instant case. Thus, NTEU and its members have a significant interest in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 771 F.2d 1504 (D.C. Cir. 1985) and contained in Petitioner's Appendix ("Pet. App.") at 1a to 22a. The opinion of the District Court for the District of Columbia is not reported, but is found at Pet. App. 23a to 33a.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was filed on August 9, 1985. (Pet. App. at 34a to 35a). The order of the Court of Appeals for the District of Columbia Circuit denying a rehearing *en banc* was filed on October 7, 1985. (Pet. App. at 36a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978 ("CSRA"), as amended and codified throughout 5 U.S.C.; the Administrative Procedure Act ("APA"), as amended, 5 U.S.C. 701 *et seq.*; and 5 C.F.R. 930.204 and 930.210(b) are found at Pet. App. 37a to 46a.

STATEMENT OF THE CASE

Petitioners are Administrative Law Judges ("ALJs") who challenge the refusal of the Office of Personnel Management ("OPM") to promote them to the GS-16 pay classification level while promoting other ALJs who performed the same duties as petitioners. They brought an action in the district court under the Administrative Procedure Act ("APA", 5 U.S.C. 701 *et seq.*), asserting that OPM's decision to classify them at a grade level below other ALJs who performed the same work was arbitrary and capricious. Pet. App. 6a.

The district court dismissed petitioners' complaint for lack of subject matter jurisdiction, relying upon the District of Columbia Circuit's decision in *Carducci* v. *Regan*, 714 F.2d 171 (D.C. Cir. 1983), Pet. App. 28a. In *Carducci*, the court held that the district courts lack APA jurisdiction of federal employee challenges to agency personnel actions, if their complaints are cognizable under the Civil Service Reform Act ("CSRA", Pub. L. No. 95-454, 92 Stat. 1111, codified in scattered sections of Title 5, United States Code). The court identified three categories of agency actions covered by the CSRA: 1) certain specified major ("adverse") actions (*e.g.* removals, demotions and suspensions of more than 14 days) which are appealable to the Merit Systems Protection Board ("MSPB"), 5 U.S.C. 7512, 7701; 2) specified minor personnel actions infected by specified improper motives ("prohibited personnel practices") which are appealable to the MSPB's Office of Special Counsel ("OSC"), 5 U.S.C. 1206; and 3)

minor personnel actions not infected by improper motive, for which there is no appeal.[1] The court held that actions falling under these three categories must be pursued under the CSRA or not at all, and are not properly brought before the district courts under the APA. 714 F.2d at 175.[2]

In this case, the district court concluded that the challenged action did not rise to the level of an adverse action but arguably stated a prohibited personnel practice under 5 U.S.C. 2302(a)(2)(A)(x) as an arbitrary and inequitable change in petitioners' duties which is inconsistent with their salary or grade level. The district court thus concluded that the disputed action fell under *Carducci* category #2 and that APA jurisdiction was therefore unavailable.[3]

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[1] Under the "prohibited personnel practices" section of the CSRA, "personnel actions" are defined as appointments, promotions, disciplinary or adverse actions, details, transfers, reassignments, reinstatements, restorations, reemployment, performance evaluations, decisions concerning pay, benefits, awards or training, and other significant changes in duties or responsibilities inconsistent with the employee's salary or grade. 5 U.S.C. 2302(a)(2).

[2] The Court also expressed its concern that:

> [T]he exhaustive remedial scheme of the CSRA would be impermissibly frustrated by permitting far lesser personnel actions not involving constitutional claims, an access to the courts more immediate and direct than the statute provides with regard to major adverse actions.

714 F.2d at 174.

[3] The district court noted that petitioners' claims concerned a personnel action (a significant change in duties inconsistent with the employee's salary or grade, 5 U.S.C. 2302(A)(2)(A)(x)), that it is a prohibited personnel practice to violate a law, rule or regulation which implements or directly concerns a merit system principle (*id.* 2302(b)(11)) and that the merit principles insure them of fair, and equitable treatment and equal pay for work of equal value (*id.* 2301(b)(2) and (3)). The district court reasoned that the petitioners' challenge to their grade classifications constituted a complaint that OPM had violated laws implementing the above merit principles and that their claims therefore alleged a prohibited personnel practice; *Carducci* category #2. Pet. App. 28a.

On appeal, the D.C. Circuit agreed with the district court that this case was governed by the decision in *Carducci* (Pet. App. 12a-13a) and that the ALJs' claim stated a prohibited personnel practice; it thus held that their only recourse was to the Office of the Special Counsel. Pet. App. 14a, n.8.[4]

REASONS FOR GRANTING THE WRIT

I. THE DISMISSAL OF PETITIONERS' COMPLAINT IS NOT SUPPORTED BY THE CIVIL SERVICE REFORM ACT AND IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW

In *Carducci*, the D.C. Circuit held that the CSRA precluded APA review of all matters covered by the CSRA's administrative enforcement scheme. The court held that the CSRA covers two types of personnel actions: major actions and minor actions. The CSRA provided for direct MSPB review of specified major actions; for minor actions there is no administrative review unless the action is infected by a specified improper motive (prohibited personnel practices), in which case the statute provides for investigation by the OSC. The D.C. Circuit held that the CSRA's administrative enforcement scheme would be impermissibly frustrated if covered actions could be challenged in the district courts under the APA. 714 F.2d at 175.

The personnel matter at issue in this case is not one of the actions enumerated in the CSRA. Although the refusal to classify petitioners at a higher grade level is unquestionably a significant action, it is not an "adverse

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[4] The Court recognized that its decision was contrary to the First Circuit's decision in *Dugan v. Ramsay*, 727 F.2d 192 (1st Cir. 1984). However, it held that the *Dugan* decision conflicts with *Carducci*, which is binding precedent in the D.C. Circuit and thus could be overruled only by an *en banc* decision. (Pet. App. 12a-13a). Petitioner's subsequent request for rehearing *en banc* was denied. Pet. App. 36a.

action" covered and thus preempted by the CSRA under *Carducci's* category #1. Further, petitioners have not alleged that the agency's decision was infected by improper motive, so their complaint does not state a prohibited personnel practice.[5] Nevertheless, the court below has expanded the rule in *Carducci* so as to preclude district court APA review of this matter, review which was traditionally available prior to passage of the Civil Service Reform Act.

The D.C. Circuit reached its result by expanding *Carducci* category #2 (prohibited personnel practices) far beyond the limits set forth by the *Carducci* court and by the statute. In fact, the court construed category #2 so broadly that any federal personnel action which is challenged as arbitrary and contrary to law would allege a prohibited personnel practice. Thus the combined effect of the decision in this case and the decision in *Carducci* is to preclude district court APA review of all challenges to unlawful and arbitrary personnel actions.[6]

This rescission of district court APA jurisdiction is not supported by the language or legislative history of the CSRA and is contrary to the well-established principle that the availability of an administrative remedy will not bar judicial review of agency action "absent clear and convincing evidence that Congress so intended." *Rusk*

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[5] Nor can this matter be classified as a minor personnel action for which there is no review (*Carducci* category #3). As the D.C. Circuit has recognized (Pet. App. at 12a), there are extremely few actions which fall into the unreviewable category. Furthermore, this case concerns petitioners' annual rate of pay, hardly a minor matter. Additionally, since such disputes were routinely heard by the district courts prior to the enactment of the CSRA (see discussion *infra*), there is a strong presumption that Congress did not intend to make such disputes unreviewable.

[6] In *National Treasury Employees Union* v. *Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984), the court held that, notwithstanding the rule in *Carducci*, district court APA review was still available in pre-enforcement challenges to agency rule-making.

v. *Cort*, 369 U.S. 367, 379-80 (1962). *See also Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1976); *Lindahl* v. *Office of Personnel Management*, —— U.S. ——, 105 S.Ct. 1620, 1627 (1985). The presumption against preclusion of APA review is particularly st ong in this case since the courts have historically had APA jurisdiction of employee challenges to agency classification decisions. *See Ward* v. *Campbell*, 610 F.2d 231 (5th Cir. 1980); *Todd* v. *Campbell*, 446 F. Supp. 149 (D.D.C. 1978); *Nederostek* v. *Adams*, 449 F. Supp. 286 (D.D.C. 1978).[7] In this case, neither the statute nor the legislative history indicate that Congress specifically intended to eliminate district court APA jurisdiction of classification disputes. Furthermore, the CSRA provides no new remedy for wrongful classification to take the place of the traditional APA review. Therefore, the D.C. Circuit erred in holding that the district court had no jurisdiction of this case.

The plain language of the CSRA does not support the D.C. Circuit's decision. While the CSRA enumerates all of the specific types of major personnel actions which fall into *Carducci* category #1,[8] it does not exhaustively identify all "minor" personnel actions which are either appealable to OSC, or not remediable at all. Rather, the statute focuses on the state of mind of the official taking

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[7] In addition to classification challenges, the courts have also had APA jurisdiction of challenges to other similar personnel actions, *e.g.*, *Haneke* v. *Secretary of Health, Education, and Welfare*, 535 F.2d 1291, 1296-7 n.10 (D.C. Cir. 1976)—challenge to employee's placement in Wage Grade Pay System rather than General Schedule; *Patternmakers League of North America* v. *Campbell*, 619 F.2d 826 (9th Cir. 1980)—challenge to transfer from special pay rate schedule to General Schedule.

[8] Specifically: removals, demotions, furloughs of 30 days or less and, since petitioners are ALJs, all suspensions (for all other employees only suspensions of more than 14 days are major actions). 5 U.S.C. 7512, 7521.

the action as the determinant of whether a prohibited personnel practice has been committed.[9]

It is clear that the action at issue in this case, a refusal to reclassify a position, falls into none of the *Carducci* categories. It is inconceivable that a decision concerning an employee's annual salary (here a matter of several thousand dollars each year) could be characterized as a minor action, but it is not one of the "major" personnel actions specified in and remediable under the Act. In contrast, for example, a suspension or a furlough for less than 30 days is a major action, fully remediable in administrative proceedings with direct judicial review. Moreover, petitioners have not alleged, nor can there be discerned, any improper motive on the part of the agency such that their claim would obviously state a prohibited personnel practice. The action is thus neither a specified major action, a specified minor action infected with improper motive, nor a minor action too trivial to be remediable at all.

However, the court below concluded that petitioners' claim states a prohibited personnel practice remediable under the Act because it alleged a violation of a law implementing a merit system principle. It noted that the merit principles protect employees from arbitrary action (Section 2301(b)(8)), require fair and equitable treatment of employees (*id.* (b)(2)), and mandate equal pay for work of equal value (*id.* (b)(3)). Since petitioners asserted that their position classification was too low, in violation of the Classification Act, the court reasoned that petitioners had alleged a violation of a law (the Classification Act) which implemented the merit principles.

[9] Thus, the statute identifies such actions as discrimination (Section 2302(b)(1) and (10)), political coercion (*id.* (b)(3)), favoritism and interference with the employment selection process (*id.* (b)(4)-(6)), nepotism (*id.* (b)(7) and reprisals for protected activity (*id.* (b)(8)-(9)) as prohibited personnel practices. The statute also identifies as prohibited personnel practices actions which violate laws, rules or regulations which implement the merit principles. *Id.* (b)(11).

The problem with the court's analysis is that it converts any arbitrary action into a "prohibited personnel practice," and then reads the statute to preempt judicial review, a preclusive effect absolutely unjustified by the statute or the intent of Congress. Under the court's analysis, any federal personnel action which is challenged as arbitrary and unlawful would allege a prohibited personnel practice, since the civil service laws are designed to insure fair treatment of federal employees. This interpretation of the statute dramatically broadens the prohibited personnel practice section of the statute beyond anything intended by Congress, and improperly infers a Congressional intent to remove from the jurisdiction of the district courts, matters which were traditionally reviewable under the APA. Furthermore, because the Special Counsel merely investigates alleged prohibited personnel practices and has the discretion to decide whether to take a case to the MSPB, a decision subject only to very limited judicial review (*Borrell* v. *U.S. International Communications Agency*, 682 F.2d 981, 988 (D.C. Cir. 1982); *Wren* v. *Merit Systems Protection Board*, 681 F.2d 867, 872-4 (D.C. Cir. 1982)), the scheme envisioned by the court below would leave petitioners without any judicial review if the OSC refuses to proceed with the case. Thus, no judicial review would be available even though such cases were routinely decided by district courts prior to the enactment of the CSRA.

[10] Under the court's reasoning, any action said to violate broad merit principles would be remediable *only* by resort to the Special Counsel. For example, the Privacy Act (5 U.S.C. 552(a)) is a law which implements the merit principle that employee privacy is to be protected (5 U.S.C. 2301(b)(2)). Violation of that principle is both a violation of the Privacy Act itself and a prohibited personnel practice since the Privacy Act implements the merit principle which

A review of the prohibited personnel practice section of the statute demonstrates that the D.C. Circuit has drastically changed the scope of that provision. Congress was concerned about discrimination, nepotism, political coercion, and reprisals against employees who engage in protected activity (Section 2302(b)(1)-(10)). It did not create a general prohibition of arbitrary action remediable only by the OSC. Although Congress did describe violations of laws implementing or directly concerning the merit principles as "prohibited personnel practices" (Section 2302(b)(11)), there is no evidence in the statute, or its legislative history, that subsection (b)(11) was intended to comprehend all allegations of arbitrary action. In fact, the House bill contained no prohibited personnel practice provision analogous to Section 2302(b)(11); the Senate bill made it a prohibited personnel practice to violate a law, rule or regulation "implementing or relating to the merit system principles." Joint Explanatory Statement of the Committee on Conference, H.R. Rep. 95-1717, 95th Cong. 2d Sess. (1978) at 131. The conferees adopted Section 2302(b)(11) as a substitute for the Senate provision, making unlawful violations of laws, rules, or regulations "which do not fall within the first 10 categories of prohibited personnel practices." However, the provision was "modified so that the law, rule or regulation must 'directly concern' a merit system principle, in order to be actionable as a prohibited personnel practice." *Ibid.*

The conferees were even more explicit in their discussion of "EXCLUSIONS FROM COVERAGE OF THE

protect employee privacy rights (5 U.S.C. 2302(b)(11). Yet the employee's right to enforce the statutory privacy rights in district court remains, and should remain, unaffected by the possible availability of alternative relief from the Special Counsel. Particularly where the Special Counsel remedy is of doubtful applicability or efficiency, as here, there is no warrant for extinguishing a pre-existing APA cause of action, any more than the Privacy Act cause of action could be extinguished.

MERIT SYSTEM PRINCIPLES AND PROHIBITED PERSONNEL PRACTICES," stating "[u]nless a law, rule or regulation implementing or directly concerning the principles is violated (as under Section 2302(b)(11)), the principles themselves may not be made the basis of a legal action by an employee or agency." *Id.* at 128.[11] It is apparent that subsection (b)(11) was merely intended to allow employees to bring to the OSC complaints similar to the 10 specifically enumerated prohibited personnel practices. If Congress had intended subsection (b)(11) to have the broad scope inferred by the D.C. Circuit, it surely would have indicated such purpose in its discussion of that provision. While it is clear that Congress established the OSC to provide federal employees with a method to challenge *any* personnel action which was infected by improper motive, there is no evidence that it thereby intended to extinguish pre-existing rights to judicial redress for violations of law.

Additionally, the analysis of the court below would render the remainder of Section 2302(b) meaningless. If subsection (b)(11) meant that all unfair and arbitrary actions were prohibited personnel practices, then the preceding ten specific prohibited personnel practices would be unnecessary since discrimination, nepotism, favoritism, political coercion, and reprisals for protected activity are inherently unfair, arbitrary and contrary to civil service law. Thus, the court has interpreted subsection (b)(11) to encompass far more than Congress

[11] For example, an employee may not challenge a training assignment as a prohibited personnel practice by alleging a violation of the merit principle mandating that employees receive effective training (5 U.S.C. 2301(b)(7)). However, the employee may file a prohibited personnel practice alleging that training selections were not in accordance with an agency's merit promotion procedures as required by 5 C.F.R. 410.301(a)(1)—a regulation which implements the merit principle concerning training.

ever intended.[12] The court below has also stretched the merit principles which were purportedly violated beyond any reasonable interpretation of those provisions. The merit principle which protects employees from arbitrary action specifically addresses personal favoritism, political coercion, and interference with elections;[13] the merit principle which concerns fair and equitable treatment specifically addresses discrimination and the protection of privacy and constitutional rights;[14] and the merit

[12] In contrast, the court's decision in *Carducci*, as well as the cases relied upon in that decision, are consistent with the CSRA scheme. *Carducci* concerned a challenge to a reassignment, due to alleged unacceptable performance, which did not result in loss of pay or grade. There can be little dispute that district court APA jurisdiction can reasonably be precluded where no injury was sustained. The cases relied upon by the *Carducci* court which addressed specific prohibited personnel practices also unexceptionally applied the CSRA. *See Borrell* v. *U.S. International Communications Agency*, 682 F.2d 981 (D.C. Cir. 1982) (discharge allegedly in retaliation for "whistle blowing") and *Cutts* v. *Fowler*, 692 F.2d 138 (D.C. Cir. 1982) (reassignment allegedly resulting from discrimination on the basis of marital status). In those cases, the D.C. Circuit correctly held that those employee complaints alleged actions which clearly stated specific prohibited personnel practices. However, the instant case does not concern specific prohibited personnel practices; nor does it concern a prohibited personnel practice under Section 2302(b)(11).

[13] Section 2301(b)(8) provides:

> Employees should be—
>
> "(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
>
> "(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

[14] Section 2301(b)(2) provides:

> All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

principle which mandates equal pay for work of equal value specifically addresses the establishment of statutory pay rates (*e.g.*, the General Schedule), and not the classification of employees within those pay systems.[15] Furthermore, the court did not identify any provision of the Classification Act which allegedly implements the above principles, a necessary prerequisite to a prohibited personnel practice under subsection (b)(11).

Thus, in addition to an overbroad reading of subsection (b)(11), the court below relied on extremely strained interpretations of the relevant merit principles in holding that petitioners' complaint states a prohibited personnel practice so as to preclude any challenge to their classifications in the district court under the APA. Given that access to the courts under the APA is presumed in the absence of clear and convincing evidence to the contrary, that the district courts have historically heard APA challenges to agency classification decisions, and that OSC decisions not to proceed with employee complaints are subject to extremely limited judicial review, the reasoning of the court below cannot support its conclusion that the CSRA precludes district court jurisdiction of this action. Thus, the decision in this case is plainly contrary to the Administrative Procedure Act.

[15] Section 2301(b)(3) provides:

> Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH DECISIONS IN THE FIRST CIRCUIT AND THE FEDERAL CIRCUIT

The decision of the court below is in direct conflict with that of the First Circuit in *Dugan* v. *Ramsay*, 727 F.2d 192 (1st Cir. 1984). There, the Court of Appeals specifically rejected the D.C. Circuit's analysis of the preemptive effect of the CSRA, and reached "a conclusion clearly contrary to *Carducci*" (Pet. App. 12a). The First Circuit refused to infer a Congressional intent to preclude district court APA review of a challenge to a personnel action merely because Congress did not provide for MSPB review of the action. The Court observed that to infer such a bar on APA review "runs counter to the strong presumption in the law that favors reviewability and almost never implies statutory preclusion of review from Congressional silence." 727 F.2d at 195.

The D.C. Circuit's decision is also in conflict with the Federal Circuit's decision in *Saunders* v. *Merit Systems Protection Board*, 757 F.2d 1288 (Fed. Cir. 1985). There, as in *Gray*, a federal employee claimed that he should have been classified at a higher grade level. The Federal Circuit affirmed the MSPB's dismissal of the employee's appeal because the Board lacks appellate jurisdiction of classification matters. The court also rejected the employee's claim that the employing agency and OPM had committed a prohibited personnel practice by refusing to compare his position to higher graded positions. The court stated that the Board lacks appellate jurisdiction to consider such matters. Although it might be inferred that a case brought to the OSC, rather than directly to the Board, would receive consideration, that route could hardly be considered efficacious, since it depends upon the MSPB for enforcement, and since the MSPB has already read its jurisdiction over such matters very narrowly. *Wren* v. *Merit Systems Protection Board*, 681 F.2d at 873-4. Thus, the decision of the court below

is in conflict with decisions in both the First and the Federal Circuits.[16]

CONCLUSION

Because the D.C. Circuit's decision is contrary to well established precedent under the APA and in conflict with decisions in other circuits, the Court should issue the writ of certiorari in this case.

Respectfully submitted,

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[16] The decision is also in conflict with the D.C. Circuit's own decision in *Etelson* v. *Office of Personnel Management*, 684 F.2d 98 (D.C. Cir. 1984). In that case, which was decided after the enactment of the CSRA, the court held that the district court had APA jurisdiction of the method used by OPM to evaluate candidates for ALJ positio

EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

LAWRENCE E. GRAY, EDWARD J. MURTY, JR. AND PETER McC. GIESEY *v.* OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-969. Decided March 24, 1986

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In this case the United States Court of Appeals for the District of Columbia Circuit held that the comprehensive remedial scheme established by Congress in the Civil Service Reform Act of 1978[1] (CSRA) indicates a Congressional intent to preclude judicial review under the Administrative Procedure Act[2] of claims that could have been reviewed administratively under the CSRA. 771 F. 2d 1504 (1985). While eight other Courts of Appeals have reached a similar conclusion, the United States Court of Appeals for the First Circuit has held to the contrary. *Dugan* v. *Ramsay*, 727 F. 2d 192 (CA1 1984). I would grant certiorari to resolve this conflict.

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[1] Pub. L. 95-454, 92 Stat. 111 (codified as amended in scattered section of 5 U. S. C. (1982).

[2] 5 U. S. C. § 701 *et seq.* (1976).